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1995]

OFFENSIVENESS, THE NEW STANDARD FOR FIRST
AMENDMENT LEGAL ADVERTISING CASES:
FLORIDA BAR v. WENT FOR IT, INC.

I. INTRODUCTION

The First Amendment of the United States Constitution guarantees freedom of speech.¹ Traditionally, courts limited the First Amendment's protection to noncommercial speech.² In 1976, however, the United States Supreme Court expressly extended First Amendment protection to commercial speech.³ A year later, the Court further extended this coverage to legal advertising.⁴ Since then, state and federal courts have fiercely debated the scope of permissible legal advertising and the extent to which it should become an ingrained part of the American judicial system.⁵

1. See U.S. CONST. amend. I. The First Amendment reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . ." *Id.* The Supreme Court applied the First Amendment to the states through the Fourteenth Amendment. *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939).

2. See *Boos v. Barry*, 485 U.S. 312 (1988) (applying strict scrutiny test to content based restriction on political speech in public forum); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (recognizing First Amendment protection of non-commercial and political speech); *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (refusing to recognize First Amendment protection for commercial speech); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (suggesting distribution of political or religious material should receive greater protection than distribution of material that is solely commercial in nature); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (recognizing different First Amendment treatment of religious and commercial material); *Jamison v. Texas*, 318 U.S. 413 (1943) (refusing to recognize First Amendment protection of commercial speech); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (noting lack of constitutional protection for commercial speech), *overruled by Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

3. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Upon reaching its conclusion, the Court stated, "[t]herefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of [commercial] information does not serve that goal." *Id.* at 765. However, the *Virginia Pharmacy* Court expressly limited its holding to the regulation of commercial advertising by pharmacists. *Id.* at 773 n.25. The Court noted that the legal profession might require different treatment. *Id.* For a discussion of *Virginia Pharmacy*, see *infra* notes 43-60 and accompanying text.

4. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The issue in *Bates* was limited to "whether the State may prevent the publication in a newspaper of . . . [a] truthful advertisement concerning the availability and terms of routine legal services." *Id.* at 384. Basing its holding on the reasoning of the *Virginia Pharmacy* decision, the Court refused to recognize any of the justifications offered by the Bar to sustain the absolute prohibition on legal advertising. *Id.* at 365, 379. For a discussion of *Bates*, see *infra* notes 61-67 and accompanying text.

5. See, e.g., *Adams v. Attorney Registration & Disciplinary Comm'n*, 801 F.2d 968 (7th Cir. 1986) (noting state bar prohibitions on direct mailing to potential

Although the Supreme Court has attempted to provide some guidance on questions involving legal advertising, much remains unclear because of the extensive number of potential factual situations.⁶ In *Florida Bar v. Went For It, Inc.*,⁷ the Court addressed one such situation when it ruled on a partial restriction on targeted, direct-mailings.⁸ In *Went For It*, a lawyer referral service challenged the constitutionality of a Florida Bar

clients violates First Amendment); *Hirschkop v. Virginia State Bar*, 604 F.2d 840 (4th Cir. 1979) (suggesting that regulation of self-laudatory advertising may not offend First Amendment protections); *In re Masini-Soler*, 882 F. Supp. 23 (D.P.R. 1995) (noting that public vulnerability to misleading legal advertising does not justify prohibition of solicitation letters); *Spencer v. Honorable Justices*, 579 F. Supp. 880 (E.D. Pa. 1984) (finding state ban on advertising subjective evaluations of attorney's background constitutional; holding blanket ban on direct-mail solicitation unconstitutional; holding ban on self-laudatory advertising to other attorneys unconstitutional; holding requirement that disclaimer accompany statements that lawyer's practice is limited to certain fields unconstitutional), *aff'd*, 698 F.2d 1218 (6th Cir. 1982); *In re Bloomfield*, 16 B.R. 220 (Bankr. D.D.C. 1981) (requiring legal clinic to charge flat fee advertised for certain services due to potentially misleading language); *Durham v. Brock*, 498 F. Supp. 213 (M.D. Tenn. 1980) (holding blanket prohibition of any advertisement without accompanying fee for services unconstitutional); *Foley v. Alabama State Bar*, 481 F. Supp. 1308 (N.D. Ala. 1979) (finding required submission of copy of advertisement to Bar association reasonable), *rev'd in part*, 648 F.2d 355 (1981); *Mezrano v. Alabama State Bar*, 434 So. 2d 732 (Ala. 1983) (upholding constitutionality of rule requiring submission of copy of advertisement to Bar and disclaimer requirements regarding quality of services and expertise of lawyer); *Eaton v. Supreme Court*, 607 S.W.2d 55 (Ark. 1980), *cert. denied*, 450 U.S. 966 (1981) (holding advertisement of \$10.00 initial consultation fee and dissemination by inclusion of advertisement in packet of discount coupons for area businesses impermissible); *Kentucky Bar Ass'n v. Gangwish*, 630 S.W.2d 66 (Ky. 1982) (holding advertisement of discounted legal fees misleading and subject to reprimand); *Johnson v. Director of Professional Responsibility*, 341 N.W.2d 282 (Minn. 1983) (holding blanket ban on advertisement of specialties unconstitutional); *In re Appert*, 315 N.W.2d 204 (Minn. 1981) (holding disciplinary action for distribution of letters and brochures regarding contingent fees for complex litigation unconstitutional).

6. See, e.g., *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) (holding total prohibition on advertising nonmisleading specialist certification on attorney letterhead unconstitutional); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (holding categorical prohibition on targeted, direct-mail solicitation unconstitutional); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (holding total prohibition on advertisements using illustrations and regarding specific legal problems unconstitutional; finding disclosure requirement of potential liability for legal costs in contingency fee advertisement constitutional); *In re R.M.J.*, 455 U.S. 191 (1982) (holding complete prohibition on blanket, direct-mail solicitation unconstitutional); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (holding total prohibition on in-person solicitation to prevent fraud, undue influence, intimidation and overreaching constitutional); *In re Primus*, 436 U.S. 412 (1978) (holding solicitation of prospective litigants by attorneys associated with non-profit organizations engaged in litigation as form of political expression entitled to First Amendment protection); *Bates*, 433 U.S. at 350 (holding total ban on attorney advertising unconstitutional).

7. 115 S. Ct. 2371 (1995). For a discussion of the *Went For It* opinion, see *infra* notes 134-91 and accompanying text.

8. A targeted, direct-mail solicitation can be characterized as a mailing sent to a defined group of people because they may be in need of a certain legal service.

rule that restricts targeted, direct-mail solicitation of personal injury and wrongful death clients.⁹ The rule requires attorneys to wait thirty days after an accident before commencing solicitation of potential clients.¹⁰ In an unprecedented decision, the Supreme Court defeated the First Amendment challenge, holding that a thirty-day ban on targeted, direct-mail solicitation of potential personal injury and wrongful death clients was consistent with the First Amendment's freedom of speech guarantee.¹¹ The opinion, in the words of dissenting Justice Kennedy, undercut important First Amendment guarantees and unsettled leading First Amendment precedents.¹²

II. FACTS

In 1990, the Florida Bar petitioned the Florida Supreme Court to approve amendments to its rules regulating legal advertising.¹³ These amendments included a total ban on targeted, direct-mail solicitation of potential personal injury and wrongful death clients.¹⁴ Basing its decision upon the United States Supreme Court's ruling in *Shapero v. Kentucky Bar Ass'n*, the court refused to endorse an absolute ban on such advertising.¹⁵ Following the court's decision, the Florida Bar adopted the controversial Rule 4-7.4, imposing a thirty-day ban on such solicitation.¹⁶

See Shapero, 486 U.S. at 469-70 (referring to letter mailed only to people involved in foreclosure suits as targeted, direct-mail solicitation).

9. *Went For It*, 115 S. Ct. at 2374.

10. *Id.*

11. *Id.* at 2381.

12. *Id.* at 2381 (Kennedy, J., dissenting).

13. *Id.* at 2374; Florida Bar: Petition to Amend the Rules Regulating the Fla. Bar — Advertising Issues, 571 So. 2d 451 (Fla. 1990).

14. *Florida Bar: Petition*, 571 So. 2d at 454. The suggested amendment stated: "Rule 4-7.4(b)(1) forbids targeted mail advertising to prospective clients if the cause of action relates to personal injury, wrongful death, or other accidents or disasters." *Id.*

15. *Id.* at 459. Judge Overton stated: "[W]e find that the United States Supreme Court's decisions in *Shapero* and *Peel* effectively hold that we cannot totally prohibit targeted mail advertising to victims, claimants, or relatives of individuals involved in personal injury and wrongful death claims." *Id.*

16. *Id.* at 466. Rule 4-7.4, Direct Contact with Prospective Clients, reads in pertinent part:

(b) Written Communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

RULES REGULATING THE FLORIDA BAR Rule 4-7.4(b) (West 1995).

Prior to the Florida Bar's adoption of Rule 4.7.4, G. Stewart McHenry, a member of the Florida Bar, and Went For It, Inc., his lawyer referral service, utilized targeted, direct-mail solicitation to seek personal injury and wrongful death clients within thirty days of an accident or disaster.¹⁷ Wishing to continue this marketing approach, Went For It, Inc. sued the Florida Bar, contending that the ban was an unconstitutional restriction on commercial speech in violation of the First and Fourteenth Amendments.¹⁸

The United States District Court for the Middle District of Florida granted Went For It's motion for summary judgment, holding the ban unconstitutional and further stating that the governmental interests in avoiding undue influence and overreaching were not substantial.¹⁹ Moreover, the district court held that the ban was not a valid time, place and manner restriction.²⁰ On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision.²¹ The Eleventh

Also in dispute was Rule 4-7.8(a)(1), Lawyer Referral Services, which reads in pertinent part:

(a) When Lawyers May Accept Referrals. A lawyer shall not accept referrals from a lawyer referral service unless the service:

(1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.

RULES REGULATING THE FLORIDA BAR Rule 4-7.8(a)(1) (West 1995).

17. *Went For It*, 115 S. Ct. at 2374. McHenry's case became moot after he was disbarred for an unrelated reason. *Id.* (citing *Florida Bar v. McHenry*, 605 So. 2d 459 (Fla. 1992)). John T. Blakely took McHenry's place, and he, along with Went For It, Inc., continued with the suit. *Id.*

18. *Id.*

19. *Id.*; *McHenry v. Florida Bar*, 808 F. Supp. 1543, 1548 (M.D. Fla. 1992), *aff'd*, 21 F.3d 1038 (11th Cir. 1994), *rev'd*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995). Because the parties stipulated that there were no genuine issues of material fact, both submitted motions for summary judgment. *Id.* at 1544. The district court judge referred the matter to a magistrate judge who concluded that the thirty-day ban was constitutional and recommended that summary judgment be entered in favor of the Florida Bar. *Id.* Upon review of the recommendation, the district court judge disagreed with the magistrate judge's finding and found that because the thirty-day ban violated the First Amendment guarantee of freedom of speech, summary judgment should be granted in favor of Went For It, Inc. *Id.* at 1548.

20. *McHenry*, 808 F. Supp. at 1547.

21. *Went For It*, 115 S. Ct. at 2375; *McHenry v. Florida Bar*, 21 F.3d 1038 (11th Cir. 1994), *rev'd*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995). The Eleventh Circuit first focused on the two interests the Florida Bar used to justify the ban. 21 F.3d at 1042-44. Regarding the first interest, the court evaluated the mode of the communication and noted that a letter has only limited ability to influence potential clients because it can be thrown away or placed in a drawer, especially when the letter is marked "Advertising Material." *Id.* at 1042-43. Regarding the second interest, the court stated that the invasion of a potential client's privacy occurs when the lawyer learns of the accident or tragedy and that this invasion usually involves no more than reading a newspaper. *Id.* at 1043-44. Finally, the court addressed whether the ban was content neutral, stating that Rule 4-

Circuit held that the ban violated the First Amendment because it was neither content neutral nor supported by a substantial governmental interest.²²

The Supreme Court subsequently granted certiorari and held that the ban was constitutional.²³ The Court employed the intermediate level of scrutiny, reviewing the ban under the test designed to evaluate restrictions upon commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.²⁴ Satisfied that the ban passed the *Central Hudson* test, Justice O'Connor stated that "[t]he Constitution . . . requires nothing more."²⁵

This Note discusses the development of the law concerning attorney advertising and solicitation and the protection it receives under the First Amendment's freedom of speech provision. Part III discusses both the historical developments leading up to the unpopularity of attorney advertising and solicitation, and the history of United States Supreme Court cases preceding *Florida Bar v. Went For It, Inc.*²⁶ Part IV analyzes the *Went For It* decision and addresses the concerns of the majority and dissenting opinions.²⁷ Part IV considers the court's reasoning directly and then critiques this reasoning in light of Supreme Court precedent.²⁸ Finally, Part V discusses the impact and practical repercussions of the *Went For It* decision.²⁹

III. BACKGROUND

Aversions to attorney advertising and solicitation are founded in the early history of the legal profession.³⁰ In England, for example, many

7.4 is clearly content based. *Id.* at 1044. The rule restricted only letters to potential personal injury and wrongful death clients. *Id.* at 1045. The court noted that "letters soliciting the same potential client under identical circumstances for probate representation or any other purpose are permitted." *Id.*

22. See *McHenry*, 21 F.3d at 1039 (affirming district court's decision).

23. *Went For It*, 115 S. Ct. at 2381.

24. *Id.* at 2376 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)). The *Central Hudson* test provides: (1) the commercial speech must not be misleading or illegal; (2) the governmental interest justifying the ban must be substantial; (3) the regulation must directly advance the governmental interest; and (4) the regulation must be no more extensive than necessary. 447 U.S. at 566.

25. *Went For It*, 115 S. Ct. at 2381.

26. For a discussion of the traditional and judicial history preceding *Went For It*, see *infra* notes 30-133 and accompanying text.

27. For a discussion of the *Went For It* decision, see *infra* notes 134-91 and accompanying text.

28. For a discussion of the decision in *Went For It* and an analysis of whether it accords with Supreme Court precedent, see *infra* notes 192-284 and accompanying text.

29. For a discussion of the impact and practical repercussions of *Went For It*, see *infra* notes 285-92 and accompanying text.

30. See generally HENRY S. DRINKER, *LEGAL ETHICS* 210-73 (1953) (detailing history of attorney advertising and solicitation); Louise L. Hill, *Solicitation by Lawyers*:

young lawyers were from wealthy families, and consequently regarded the law as a higher profession focusing on public service, not on making a living.³¹ Consequently, the profession developed an almost aristocratic dignity that directly conflicted with common practices of competition and solicitation.³² Earlier roots of disfavor stem from Greek and Roman civilizations, which disapproved of interference in law suits by disinterested intervenors.³³

In early America, the English ideals regarding advertising and solicitation did not initially attach to American legal practice.³⁴ In fact, during the 1850s, Abraham Lincoln used advertising and solicitation to obtain clients.³⁵ With the advent of the American Bar Association and the adoption of the Canons of Ethics,³⁶ however, much of the formerly tolerated conduct was drastically limited. These Canons later developed into the

Piercing the First Amendment Veil, 42 ME. L. REV. 369, 370-78 (1990) (discussing impact of English, Greek and Roman tradition upon modern view of attorney advertising).

31. DRINKER, *supra* note 30, at 210; see ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953) (discussing public service aspect of English legal profession); Hill, *supra* note 30, at 376-78 (discussing English lawyer's view of public service).

32. DRINKER, *supra* note 30, at 210; see Paul H. Francis & Jennifer J. Johnson, *The Emperor's Old Cloth: Piercing the Bar's Ethical Veil*, 13 WILLAMETTE L.J. 221, 224 (1977) (discussing aversion to competition within early English legal profession); Hill, *supra* note 30, at 378 (stating that etiquette tended to hamper solicitation).

33. Hill, *supra* note 30, at 370-73. Although intervention in the name of public interest came to be an accepted practice, an intervenor motivated by money, prestige or political advantage known as a "sycophant" or "calumniator" was still viewed with suspicion and distaste. *Id.* at 371-73. For a general discussion of the Greek and Roman law, see H.F. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (1961); J. WALTER JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS* (1956); DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* (1978); and J.A.C. THOMAS, *TEXTBOOK OF ROMAN LAW* (1976). See also Jeffrey S. Kinsler, *Targeted, Direct-Mail Solicitation: Shapero v. Kentucky Bar Association Under Attack*, 25 LOY. U. CHI. L.J. 1, 4 (1993) (briefly recognizing impact of Greek and Roman law on evolution of attorney advertising).

34. Kinsler, *supra* note 33, at 5 (discussing early American law practices). For a discussion of the history of American law, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985). See also Hill, *supra* note 30, at 378-80 (discussing lawyering in United States);

35. Kinsler, *supra* note 33, at 5; Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 547-48 (1982).

36. See Kinsler, *supra* note 33, at 5-6 (noting restrictive effect of various American Bar Association rules upon attorney advertising); Hill, *supra* note 30, at 380-88 (discussing bar guidelines and rules prohibiting solicitation). At its adoption in 1908, Canon 27 read in pertinent part: "solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional." DRINKER, *supra* note 30, at 215 (citing CANONS OF PROFESSIONAL ETHICS, Canon 27 (1908)).

Model Code of Professional Responsibility³⁷ and the Model Rules of Professional Conduct.³⁸

37. Kinsler, *supra* note 33, at 5-6. DR 2-101 of the Model Code of Professional Responsibility reads:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, . . . the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast . . . is presented in a dignified manner.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1983). The rule then continues by listing twenty-five areas that may be included in such advertisements. *Id.*

38. See Hill, *supra* note 30, at 385-87 (noting Model Rules are less restrictive than Model Code but do not free profession from regulation). Rule 7.2, Advertising, of the Model Rules of Professional Conduct, reads in pertinent part:

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1994).

Rule 7.3, Direct Contact with Prospective Clients, reads in pertinent part:

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

Although historical developments greatly influenced the legal profession's advent of advertising and solicitation rules, the United States Supreme Court has had an unequalled effect.³⁹ Initially, the Court was very reluctant to expand First Amendment protections to commercial activities.⁴⁰ However, in the mid-1970s, the Court began to recognize commercial speech as a form of protected speech⁴¹ and has subsequently increased judicial protection of legal advertising and solicitation.⁴²

(d) Notwithstanding the prohibition in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1994). For a discussion of the adoption of the Model Rules of Professional Conduct, see Ralph J. Mauro, Note, *Constitutional Regulation of "Targeted Direct-Mail Solicitation" By Attorneys After Shapero — A Proposed Rule of Conduct*, 34 VILL. L. REV. 281 (1989).

39. See Hill, *supra* note 30, at 388-409 (discussing Supreme Court's gradual expansion of First Amendment protection of commercial speech). For a discussion of the impact of Supreme Court cases on First Amendment protection of attorney advertising, see *infra* notes 39-133 and accompanying text.

40. See *Breard v. City of Alexandria*, 341 U.S. 622, 641-45 (1951) (denying First Amendment protection for commercial speech); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (noting lack of constitutional protection for commercial speech).

In *Valentine v. Chrestensen*, Chrestensen, a Floridian, took his Navy submarine to New York. *Id.* at 52-53. He docked it at a pier and had handbills printed to solicit visitors to tour the submarine for a fee. *Id.* at 53. One side of the bill contained the advertisement and the other side contained statements protesting actions of the City Dock Department. *Id.* The police informed Chrestensen that the law prohibited distribution of the handbill because of its commercial content. *Id.* When he proceeded to distribute the handbill, the police restrained him. *Id.* The Court held that the Constitution does not prohibit the government from unduly burdening or proscribing commercial speech in public places. *Id.* at 54. Accordingly, the law was upheld. *Id.* at 55.

In *Breard v. City of Alexandria*, a municipal ordinance prohibited door-to-door solicitation for the purpose of selling products at private residences without the owners consent. 341 U.S. at 624-25. Breard was arrested as he was going door-to-door soliciting magazine sales. *Id.* at 624. When addressing the First Amendment challenge, the Court stated that the ordinance's constitutionality depended upon weighing the homeowner's privacy against the publisher's right to distribute magazines in the most effective manner. *Id.* at 644. Finding the ordinance constitutional, the Court stated, "it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents." *Id.* at 645. The Court came to this conclusion even though privacy did not officially receive constitutional recognition until 1965 in *Griswold v. Connecticut*. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (recognizing constitutional right of privacy).

41. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (recognizing First Amendment protection for commercial speech); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (rejecting notion that commercial publication was without First Amendment protection).

42. See *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) (recognizing attorney's right to advertise certification as trial specialist); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (recognizing First Amend-

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,⁴³ the Court considered "whether there is a First Amendment exception for 'commercial speech.'" ⁴⁴ The speech under attack in *Virginia Pharmacy* was not an editorial "on any subject, cultural, philosophical, or litical [sic]," nor did it "report any particularly newsworthy fact, or . . . make generalized observations even about commercial matters."⁴⁵ Rather, the only idea the advertiser communicated was, " 'I will sell you the X prescription drug at the Y price.' " ⁴⁶

The controversy in *Virginia Pharmacy* stemmed from a challenge to a Virginia statutory section prohibiting pharmacists from advertising prescription drug prices.⁴⁷ Because this dispute involved a commercial advertisement, the Court decided that the advertiser's motivation is presumed to be purely economic.⁴⁸ The Court also stated, however, that this presumption "hardly disqualifies him from protection under the First Amendment"⁴⁹ and recognized the strong societal interest in the free flow of

ment protection for targeted, direct-mail solicitation); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (recognizing First Amendment protection for legal newspaper advertisements); *In re R.M.J.*, 455 U.S. 191 (1982) (recognizing First Amendment protection for legal advertisement in newspaper and use of direct mailings); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (recognizing First Amendment protection for legal advertisements in newspaper).

43. 425 U.S. 748 (1976).

44. *Id.* at 760. Previously, the Court indicated through its decisions that commercial speech did not enjoy First Amendment protection; see *Breard*, 341 U.S. at 642 (upholding conviction for violation of ordinance prohibiting door-to-door solicitation of magazines, because selling brings commercial feature to transaction); *Valentine*, 316 U.S. at 54 (holding that First Amendment does not protect "purely commercial advertising"). However, the Court's position was wavering by the time it decided *Virginia Pharmacy*. See *Bigelow*, 421 U.S. at 826 (stating relationship of speech to commercial marketplace does not make it worthless in marketplace of ideas).

45. *Virginia Pharmacy*, 425 U.S. at 761.

46. *Id.*

47. *Id.* at 749-50. The plaintiff-appellees in *Virginia Pharmacy* were a group of consumers, not pharmacists, who believed that they would greatly benefit if the state lifted the prohibition and allowed advertising. *Id.* at 753. Therefore, the question first addressed by the Court was that even if the First Amendment protected the speech, was the "protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves." *Id.* at 756. The Court held that "where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." *Id.*

48. *Id.* at 762.

49. *Id.* The Court compared the economic motivation in *Virginia Pharmacy* to the contestants in a labor dispute whose interests are also primarily economic. *Id.* The Court recognized that employees and employers receive First Amendment protection for expressions on the merits that attempt to influence the outcome of such disputes. *Id.*; see, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (holding regulation of speech intended to influence outcome of labor dispute constitutional); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941) (same); *AFL v. Swing*, 312 U.S. 321 (1941) (recognizing state power to regulate speech, but refusing to allow suppression of speech concerned exclusively with economic interests).

information.⁵⁰ Ultimately, the Court weighed the interests of pharmacists, consumers and society against the state's interests in maintaining professionalism, the pharmacist's expertise, consumer health and avoidance of price competition.⁵¹

The *Virginia Pharmacy* Court first found that professionalism, as a justification for regulating commercial speech, was no longer viable because of the already existent state regulation of Virginia pharmacists, which guaranteed high professional standards.⁵² Justice Harry Blackmun, writing for the Court, also observed that Virginia was attempting to protect its citizens by essentially keeping them in the dark.⁵³ Justice Blackmun asserted that "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."⁵⁴ Justice Blackmun concluded, therefore, that states cannot protect citizens through the suppression of lawful price competition among pharmacists.⁵⁵

Nevertheless, the *Virginia Pharmacy* Court did not free all types of commercial speech from statutory regulation.⁵⁶ Justice Blackmun reasoned that time, place and manner restrictions could regulate protected commercial speech as long as they are content neutral, serve to justify a significant government interest and leave open alternative channels of communication.⁵⁷ The Court further allowed restrictions upon false or

50. *Virginia Pharmacy*, 425 U.S. at 764. The Court noted that with regard to consumers, suppression of commercial speech would hit the poor, sick and aged the hardest. *Id.* at 763. Regarding society in general, the Court stated that even though not all commercial speech contains a public interest element, the free flow of information serves to "enlighten public decisionmaking." *Id.* at 765. See FEDERAL TRADE COMMISSION, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 10-19 (1984) (discussing consumer benefits from unrestricted, truthful legal advertising).

51. *Virginia Pharmacy*, 425 U.S. at 766-68.

52. *Id.* at 768. The Court generally discussed the pharmaceutical profession and the Virginia State Board of Pharmacy's regulatory power at the beginning of the decision. *Id.* at 750-52.

53. *Id.* at 770. Justice Blackmun suggested that in place of this "highly paternalistic approach," the state should "assume that . . . [commercial] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Virginia Pharmacy*, 425 U.S. at 771. In a line of cases including *Clark v. Community for Creative Non-Violence*, the Supreme Court defined the scope of permissible time, place and manner restrictions. 468 U.S. 288, 293 (1984); see also *Burson v. Freeman*, 504 U.S. 191 (1992) (listing three requirements for valid reasonable time, place and manner restrictions: (1) content neutral; (2) narrowly tailored to serve compelling governmental interest; and (3) leaving ample alternative channels for communication of information); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (same); *United States v. Grace*, 461 U.S. 171, 177 (1983) (same); *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (same); *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640,

misleading commercial speech⁵⁸ and commercial speech that proposes illegal activities.⁵⁹ In conclusion, however, the Court limited its opinion to the pharmaceutical profession, stating that for other professions, such as medicine or law, other factors would have to be considered.⁶⁰ The oppor-

647-48 (1981) (same); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980) (same); *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 771 (1976) (same). In *Clark*, the National Park Service granted the Community for Creative Non-Violence (CCNV) a permit for the construction of a tent city in Lafayette Park and the Mall in Washington D.C. to demonstrate the plight of the homeless. 468 U.S. at 291-92. However, the National Park Service denied CCNV's request to allow people to sleep in the tents. *Id.* at 292. This activity involved symbolic speech, an expression combining the elements of "speech" and "nonspeech," i.e., sleeping in a park to convey a view regarding homelessness. *Id.* at 293. When symbolic speech is involved, government regulation is justified,

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968). CCNV claimed that regulation requiring the denial violated the First Amendment right to free expression. *Clark*, 468 U.S. at 292. The Supreme Court rejected this argument and stated that, "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Id.* at 293. Justice White found that the regulation was content neutral, narrowly tailored and left open alternative channels for communication, and therefore, met the requirements for a valid time, place and manner restriction. *Id.* at 295-96.

However, at least with regard to adult entertainment, the Supreme Court is more willing to sanction regulations that discriminate on the basis of content. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 596 (1991) (finding state regulation of nude dancing based on the message communicated) (White, J., dissenting); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 57 (1986) (stating that zoning ordinance discriminated against adult theaters on basis of speech content) (Brennan, J., dissenting); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 84 (1976) (stating that ordinance regulated adult establishments based on content of speech) (Stewart, J., dissenting).

For a detailed discussion of time, place and manner restrictions, see Elizabeth Langworthy, Note, *Time, Place, or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127 (1983). Time restrictions involve limiting expression during specific times. *Id.* at 130. Place restrictions regulate expression in connection with the use of public property. *Id.* at 130-31. Manner restrictions regulate a combination of speech and conduct. *Id.* at 131-32.

58. *Virginia Pharmacy*, 425 U.S. at 771; see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (holding that untruthful speech receives no First Amendment protection); *Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961) (stating that First Amendment does not absolutely protect false or untrue speech).

59. *Virginia Pharmacy*, 425 U.S. at 772-73; see *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (holding that ordinance prohibiting reference to gender in job advertisement did not violate First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that First Amendment does not protect speech promoting lawless behavior); *Konigsberg*, 366 U.S. at 49 n.10 (language soliciting crime is not protected speech).

60. *Virginia Pharmacy*, 425 U.S. at 773 n.25. The Court stated that its decision did not address other professions because the historical and functional distinctions may require consideration of different factors. *Id.* The Court specifically men-

tunity to address some of these factors arose one year after *Virginia Pharmacy*, in *Bates v. State Bar of Arizona*.⁶¹

In *Bates*, the Supreme Court extended First Amendment protection to legal advertising.⁶² Two attorneys directly violated an Arizona disciplinary rule⁶³ by placing an advertisement in a daily newspaper offering "legal services at very reasonable fees" and listing certain fees.⁶⁴ Much like its analysis in *Virginia Pharmacy*, the Court weighed the attorneys' economic interest coupled with the consumers' interest in the free flow of commercial information against the state's interest in maintaining professionalism, protecting its citizens and avoiding increased litigation.⁶⁵ Once again, the Court sided with the consumers and ruled that the state's blanket prohibition on legal advertising was unconstitutional.⁶⁶ However, as in *Virginia*

tioned lawyers because they provide various services, and the potential for confusion and deception is greater if they partake in certain advertising practices. *Id.*

61. 433 U.S. 350 (1977).

62. *Id.* at 384. For a discussion of the aftermath of the *Bates* decision, see Boden, *supra* note 35.

63. *Bates*, 433 U.S. at 355-56. The Arizona rule provides in pertinent part: A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so on his behalf.

ARIZ. SUP. CT. R. 29(a) (Supp. 1976) (amended 1992).

64. *Bates*, 433 U.S. at 354. The attorneys operated a "legal clinic" that attempted to furnish legal services to consumers whose income was high enough to prevent them from qualifying for governmental legal aid, but was low enough to put high-priced legal service beyond their reach. *Id.*

65. *Id.* at 367-79. The Court analyzed the state's six justifications offered in support of the ban. *Id.* at 368-79. First, the Court examined the advertising's adverse effect on professionalism, stating that it is no secret that lawyers make their living at the bar and that the public may view any prohibition on advertising as a "failure to reach out and serve the community." *Id.* at 370. Second, the Court reviewed the misleading nature of attorney advertising, stating that "[a]lthough many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type." *Id.* at 372. Third, the Court discussed advertising's adverse effect on the administration of justice, reasoning that "[a]lthough advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* at 376. Fourth, the Court addressed advertising's undesirable economic effects, noting that although advertising's effect on products is unknown, there is evidence to suggest that prices are usually lower on advertised products. *Id.* at 377. Advertising also tends to open the profession to new attorneys who would otherwise be isolated from the community. *Id.* at 378. Fifth, the Court examined the adverse effects advertising may have on the quality of services, stating that a shoddy attorney will be a shoddy attorney with or without advertising. *Id.* at 378; see *Cohen v. Hurley*, 366 U.S. 117, 124 (1961) (recognizing state concern that lawyers concentrating on gaining new clients may let other responsibilities fall to wayside). Finally, the Court addressed the difficulties of enforcement, noting that a vast majority of attorneys will most likely continue to abide by their oaths with or without advertising. *Bates*, 433 U.S. at 379.

66. *Bates*, 433 U.S. at 384.

Pharmacy, the Court added that some restrictions upon such advertising would be permissible.⁶⁷

In 1978, the Court continued its examination of issues encompassing lawyer advertising, specifically addressing in-person and direct-mail solicitation in *Ohralik v. Ohio State Bar*⁶⁸ and *In re Primus*.⁶⁹ The Court arrived at different conclusions in these two cases because they involved two distinctive in-person solicitations.⁷⁰

In *Ohralik*, an attorney contacted two eighteen-year-old women who were involved in an automobile accident.⁷¹ The attorney visited one woman in the hospital and the other at her home, offering to represent them on a contingency fee basis.⁷² The Court found that attorney Ohralik's personal solicitation and acceptance of employment from the women violated the Ohio Code of Professional Responsibility.⁷³ The Court rejected

67. *Id.* at 383-84. The Court reiterated the allowable restrictions mentioned in *Virginia Pharmacy*, that is, those on false or misleading commercial speech, on commercial speech that concerns illegal activities, on advertising on the electronic broadcast media and time, place and manner restrictions. *Id.* (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-73 (1976)). Further, the Court noted that restraints on in-person solicitation may be allowable, as well as limited supplementation in written advertisements or solicitations in the form of printed warnings or disclaimers. *Id.* at 384.

68. 436 U.S. 447 (1978).

69. 436 U.S. 412 (1978).

70. *Ohralik*, 436 U.S. at 468 (holding prohibition of in-person solicitation constitutional). *But see In re Primus*, 436 U.S. at 439 (holding prohibition of solicitation related to non-profit organization unconstitutional). The *Ohralik* Court held that because of the inherent potential for overreaching in an attorney's in-person solicitation, a prophylactic rule is necessary to protect the public. *Ohralik*, 436 U.S. at 468. For a discussion of *Ohralik*, see *infra* notes 71-78 and accompanying text.

In *In re Primus*, the Court held that the First Amendment protects a lawyer who is associated with a non-profit organization that pursues litigation as a form of political expression. *In re Primus*, 436 U.S. at 431-32. The attorney, Primus, advised a group of women of their legal rights and sent a letter to one of the women informing her of the free legal service available through the organization. *Id.* at 439. For a discussion of *In re Primus*, see *infra* notes 79-86 and accompanying text.

71. *Ohralik*, 436 U.S. at 449.

72. *Id.* at 450. Both women ultimately decided to discharge the attorney, but he refused to step aside. *Id.* at 452. In fact, he recovered \$4,166.66 from one woman for breach of contract and sued the other for \$2,466.66 in a suit that was dismissed. *Id.* at 452 nn.5-7. This and other behavior prompted the women to file a complaint with the Grievance Committee of the Geauga County Bar Association. *Id.* at 452.

73. *Id.* at 453. Disciplinary Rule 2-103(A) of the Ohio Code of Professional Responsibility provided:

DR 2-103(A)

A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1970). Furthermore, Disciplinary Rule 2-104(a) of the Ohio Code of Professional Responsibility provided in pertinent part:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting

Ohralik's argument that the First Amendment protected such conduct, stating that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services."⁷⁴ Moreover, the Court noted that in-person solicitation often demands an immediate answer and does not allow time for reflection.⁷⁵ Consequently, in-person solicitation deserves the interests of both consumers and society through the hinderance of intelligent choice.⁷⁶ The Court concluded that because in-person solicitation may damage the interests of consumers and society, the state has a substantial interest in preventing attorneys from overreaching.⁷⁷ Therefore, the Court upheld the constitutionality of the rule prohibiting in-person solicitation.⁷⁸

from that advice, except that: (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (1970).

74. *Ohralik*, 436 U.S. at 455. The Court stated that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 456 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). In *Ohralik*, the activity in question was in-person solicitation, "a business transaction in which speech is an essential but subordinate component." *Id.* at 457.

75. *Id.* at 457. Moreover, the Court found that in-person solicitation may result in a biased presentation by an attorney fostering unwise decision-making on the part of the potential client. *Id.* Also, there is no intervention or information available from another source. *Id.*

76. *Ohralik*, 436 U.S. at 458. The Court stated that even though the solicitation may provide information regarding legal rights and remedies, it is likely to discourage comparison of all available legal services. *Id.* at 457.

77. *Id.* at 462. Justice Powell stated "it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." *Id.* at 464-65. Then the Court distinguished printed advertisements, stating that the reader of such material "can effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Id.* at 465 n.25 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). Overreaching is defined as getting the better of someone especially by deceit or trickery. WEBSTER'S COLLEGE DICTIONARY 965 (1991). It can also involve cheating others. *Id.*

Cohen v. California is the foremost Supreme Court case addressing offensive speech. 403 U.S. 215 (1971). In *Cohen*, Paul Robert Cohen walked through the Los Angeles County Courthouse wearing a jacket with the words "Fuck the Draft" clearly emblazoned upon it. *Id.* at 16. The Los Angeles Municipal Court convicted Cohen of disturbing the peace. *Id.* at 15-16. The Supreme Court reversed the conviction finding that Cohen was in fact being punished for the communication of offensive words, i.e., speech. *Id.* at 18-19. Rejecting offensiveness as a permissive standard for the regulation of speech, the Court asked: "How is one to distinguish this [word, i.e., fuck] from any other offensive word?" *Id.* at 25. In the absence of obscenity, fighting words or a captive audience, the Court found that the state simply lacked any justification for the regulation. *Id.* at 19-22, 26.

78. *Ohralik*, 436 U.S. at 467. In *Edenfield v. Fane*, the Supreme Court addressed in-person solicitation by a certified public accountant (CPA). 113 S. Ct.

Conversely, in *In re Primus*, an attorney cooperating with the American Civil Liberties Union (ACLU) advised a group of women of their legal rights, where sterilization was a mandatory prerequisite for Medicaid assistance.⁷⁹ The attorney later sent a letter to one of these women advising her that she could obtain free legal representation from the ACLU.⁸⁰ The Board of Commissioners on Grievances and Discipline charged Primus, the attorney, with violating the South Carolina Disciplinary Rules, which prohibited such solicitation.⁸¹ After the Supreme Court of South Carolina

1792 (1993). The state offered two interests to justify the ban: (1) to protect consumers from fraud and overreaching, and consumer privacy; and (2) to protect both the fact and appearance of CPA independence when performing business audits. *Id.* at 1799. The Court found the interests substantial, but held the ban unconstitutional because it failed to advance the interests in a direct and material manner. *Id.* at 1800. The Court distinguished the legal profession stating, "[u]nlike a lawyer, a CPA is not 'a professional trained in the art of persuasion.'" *Id.* at 1802.

79. *In re Primus*, 436 U.S. 412, 414-16 (1978).

80. *Id.* at 416. The body of the letter read in pertinent part:

Dear Mrs. Williams:

You will probable [sic] remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Now I have a question to ask of you. Would you object to talking to a women's magazine about the situation in Aiken? The magazine is doing a feature story on the whole sterilization problem and wants to talk to you and others in South Carolina. . . .

I want to assure you that this interview is being done to show what is happening to women against their wishes, and is not being done to harm you in any way. But I want you to decide, so call me collect and let me know of your decision. This practice must stop.

Id. at 416 n.6. Eventually, Mrs. Williams, the recipient of the letter, decided not to pursue a cause of action against the doctor who performed the sterilization. *Id.* at 417.

81. *Id.* at 418-21. Primus was charged with violating Disciplinary Rules 2-103(D)(5)(a) and (c) and 2-104(A)(5) of the Supreme Court of South Carolina. *Id.* Disciplinary Rule 2-103 provided:

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

...
(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

found Primus guilty of this violation, Primus appealed to the United States Supreme Court on First Amendment grounds.⁸² The Supreme Court held that the letter deserved First Amendment protection.⁸³ The Court noted that monetary gain motivated neither the attorney nor the ACLU.⁸⁴ Rather, the Court found that both parties used litigation as "a vehicle for effective political expression and association."⁸⁵ Thus, the Court held that restrictions on this type of solicitation are unconstitutional.⁸⁶

Following the Court's decisions in *Ohrlik* and *In re Primus*, the Court developed a test, based upon previous commercial speech cases, to determine whether restrictions on commercial speech are constitutional.⁸⁷ In

...
(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

Rules on Disciplinary Procedure, Vol. 22, CODE OF LAWS OF SOUTH CAROLINA DR 2-103 (1976). Furthermore, Disciplinary Rule 2-104 provided:

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

...
(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Rules on Disciplinary Procedure, Vol. 22, CODE OF LAWS OF SOUTH CAROLINA DR 2-104 (1976).

82. *In re Primus*, 436 U.S. at 421.

83. *Id.* at 431. In reaching this conclusion, the Court relied heavily upon its decision in *NAACP v. Button*, 371 U.S. 415 (1963). *In re Primus*, 436 U.S. at 432. In *Button*, the Court held that the First Amendment protects an attorney's ability to solicit clients to further the civil-rights objectives of the organization, to associate with others, and freely advance beliefs and ideas. *Button*, 371 U.S. at 430 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). In *In re Primus*, the Court found that the evidence did not support the state's attempt to distinguish *Button*. *In re Primus*, 436 U.S. at 427.

84. *In re Primus*, 436 U.S. at 428-29. The Court stated that neither Primus nor the ACLU would have shared in any monetary award that the plaintiff may have received. *Id.* The state, however, questioned the ACLU's policy in requesting legal fees. *Id.* at 429. The Court denied the disciplinary board's suggestion that this fact distinguished the present case from *Button*, because the NAACP also requested legal fees. *Id.* Furthermore, the legal fees were not subtracted from the plaintiff's award, and when recovered, they are submitted to the ACLU's central fund. *Id.* at 430. Therefore, these facts rebut any presumption that monetary gain rather than supporting civil rights motivated the ACLU to sponsor the litigation. *Id.* at 429-30.

85. *Id.* at 431. Justice Powell stated that "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *Id.*

86. *Id.* at 439.

87. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

Central Hudson Gas & Electric Corp. v. Public Service Commission,⁸⁸ the Court set forth a test consisting of four prongs: (1) the speech cannot relate to illegal activity or be misleading;⁸⁹ (2) the restriction must serve a substantial government interest;⁹⁰ (3) the regulation must directly advance the proposed substantial government interest;⁹¹ and (4) the restriction must be no more stringent than necessary to serve the particular government interest.⁹² In *Central Hudson*, the New York Public Service Commission banned all advertisements promoting the use of electricity.⁹³ The Court found that this restriction failed the test's fourth prong because the Commission failed to prove that a total ban was the only means to serve the government's interests in conservation and maintenance of fair utility rates.⁹⁴

The Court used the *Central Hudson* test to address restrictions on the use of blanket, direct-mail solicitation and advertisement content in *In re*

88. 447 U.S. 557 (1980). For a detailed discussion of the *Central Hudson* decision, see R. Steven Jones, *Electric and Gas Utility Advertising: The First Amendment Legacy of Central Hudson*, 60 WASH. U. L.Q. 459 (1982).

89. *Central Hudson*, 447 U.S. at 566. The Court determined that the first prong of the *Central Hudson* test requires a determination of whether the First Amendment protects the speech. *Id.* At the very least, this requires that the commercial speech concern a legal activity and not be misleading. *Id.*

90. *Id.*

91. *Id.* at 566. There must be an immediate connection, one not based upon speculation, between the ban and the interest. *See id.* at 569 (holding connection between advertising prohibition and electricity rate structure highly speculative); *see also* Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1591-92 (1995) (finding that government did not satisfy *Central Hudson* test because prohibiting beer labels from displaying alcohol content did not directly and materially advance purported interest in preventing strength wars, i.e., when competing beer producers regularly increase strength of beer to attract competitors' customers).

92. *Central Hudson*, 447 U.S. at 566. This part of the test is known as the "least restrictive" means test. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985). The Court's decision in *Board of Trustees v. Fox*, 492 U.S. 469 (1989), weakened and redefined this test to require "a 'fit' between the legislature's ends and the means chosen to accomplish those ends . . . a means narrowly tailored to achieve the desired objective." 492 U.S. at 480; *see also* *Posadas De Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341 (1986) (stating last two prongs of *Central Hudson* test required consideration of "fit" between legislative means and ends); JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 1045 (4th ed. 1992) (stating *Fox* "materially eroded" fourth part of *Central Hudson* test); Hill, *supra* note 30, at 407-09 (discussing how *Fox* modified least restrictive means test indicating looser interpretation of word "necessary"). Originally, the *Central Hudson* Court defined this portion of the test by stating, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." 447 U.S. at 564. For a discussion of *Fox*, *see infra* notes 127-32 and accompanying text.

93. *Central Hudson*, 447 U.S. at 558. The regulation sought to reduce the use of electricity because of the city's concern that it would be unable to meet the demands during the winter of 1973-74. *Id.* at 559.

94. *Id.* at 570-71.

*R.M.J.*⁹⁵ This case involved an attorney who mailed a general flyer announcing the opening of his law office.⁹⁶ In addition, the attorney's newspaper advertisements contained information that violated Missouri's Bar Rules on attorney advertising.⁹⁷ The Court employed the *Central Hudson*

95. 455 U.S. 191, 203 (1982). For a discussion of the belief that *In re R.M.J.* expanded First Amendment protection for legal advertising, see Audrey Shields, Note, *Attorney's Expanding Right to Advertise Under the First Amendment*: *In re R.M.J.*, 26 How. L.J. 281 (1983). *In re R.M.J.* proposed that attorneys can advertise in print advertisements in any manner as long as the contents are honest and non-deceptive. 455 U.S. at 202. For a discussion of the argument that *In re R.M.J.* created a different, and less exacting, standard of review for legal advertising, see John Rattino, Note, *In re R.M.J.: Reassessing the Extension of First Amendment Protection to Attorney Advertising*, 32 CATH. U. L. REV. 729, 754-57 (1983).

96. *In re R.M.J.*, 455 U.S. at 196. R.M.J. was charged with violating Disciplinary Rule 2-102(A)(2), which forbade general mailings and stated that announcement cards may only be sent to "lawyers, clients, former clients, personal friends, and relatives." *Id.*

The Court formerly addressed an absolute prohibition on a general mailing containing elements of commercial speech in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). *Id.* The prohibition forbade the general mailing of contraceptive advertisements. *Id.* at 61. One of the interests offered to support the regulation was the prevention of recipients taking offense to the material. *Id.* at 71. However, the Court held that unless the recipients are a captive audience, offensiveness alone is insufficient even when the information is mailed to the home. *Id.* at 71-72. The Court found that the recipients did not constitute a captive audience because the recipients could avoid the mailing by averting their eyes and making a trip to the garbage can. *Id.* at 72 (citing *Cohen v. California*, 403 U.S. 15, 21 (1971); citing *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968)). The Court found that the second interest, assisting parents' discussions of contraceptives with their children, was substantial. However, the Court held that the regulation was an unconstitutional means of effectuating the interest. *Id.* at 73-75.

Offensiveness, as a justification for restrictions upon commercial speech, was also discussed in *Carey v. Population Services International*. 431 U.S. 678, 701 (1977). In *Carey*, New York sought to prohibit the advertisement and display of contraceptives. *Id.* at 678. The state contended that the potential for offense and embarrassment of people exposed to the advertisements and displays justified the restriction. *Id.* at 701. The Court recognized that offensiveness was not a classic justification for the suppression of expression covered by the First Amendment. *Id.* The Court then concluded by stating, "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." *Id.* (citing *Cohen v. California*, 403 U.S. 15 (1971)).

97. *In re R.M.J.*, 455 U.S. at 198. R.M.J. was also charged with violating Disciplinary Rule 2-101, which states that an attorney may "publish . . . in newspapers, periodicals and the yellow pages of telephone directories" 10 categories of information: name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a fee schedule; credit arrangements; and the fixed fee to be charged for certain specified "routine" legal services. *Id.* at 194. In addition, the rule permitted an attorney to list practice areas by using the terms "General Civil Practice," "General Criminal Practice" or "General Civil and Criminal Practice," or by using one or more of 23 specific areas allowed by the rule. *Id.* at 195.

In a related case involving accounting designations, *Ibanez v. Florida Department of Business and Professional Regulation*, the Supreme Court dealt with censorship of the terms "certified public accountant" and "certified financial planner" in a legal advertisement. 114 S. Ct. 2084, 2085 (1994). Because the state failed to prove that

test to assess the constitutional implications of the flyer and advertisements.⁹⁸ The Court found: (1) no evidence proving that any of the commercial speech was misleading; (2) no proposed substantial government interests; and (3) no indication that anything short of an absolute ban was necessary.⁹⁹ Accordingly, the Court ruled that the restrictions were unconstitutional.¹⁰⁰

In 1985, the Court once again addressed questions concerning the content of advertising in *Zauderer v. Office of Disciplinary Counsel*.¹⁰¹ In *Zauderer*, the Office of Disciplinary Counsel charged that two of the attorney's newspaper advertisements violated Ohio's disciplinary rules.¹⁰² This case drove the Court to specifically address three separate areas of attorney advertising and solicitation: (1) prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems;¹⁰³ (2) restrictions on the use of illustrations in

such designations would mislead the public or that any other harm would result, the Court held the censoring unconstitutional. *Id.* at 2086-87.

98. *In re R.M.J.*, 455 U.S. at 203.

99. *Id.* at 205-06.

100. *Id.* at 207.

101. 471 U.S. 626 (1985). For an assertion that *Zauderer* increased First Amendment protection for attorney advertising, see William B. Fecher, *Professional Responsibility: The United States Supreme Court Gives Attorney Advertising Increased Protection*—*Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985), 11 U. DAYTON L. REV. 455 (1986).

102. *Zauderer*, 471 U.S. at 655. The Court listed *Zauderer*'s violations as: DR 2-101(B), which prohibits the use of illustrations in advertisements run by attorneys, requires that ads by attorneys be "dignified," and limits the information that may be included in such ads to list of 20 items; DR 2-103(A), which prohibits an attorney from "recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer"; and DR 2-104(A), which provides . . . that "[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

Id. at 632-33 (footnote omitted) (quoting OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B), 2-103(A), 2-104(A) (1982)). In addition, the Court listed DR 2-101(B)(15), which provided that any advertisement mentioning contingent-fee rates must inform the reader whether court costs are deducted before or after a determination of the percentage, and the failure to state that clients are liable for costs (as opposed to legal fees) regardless of the outcome of the litigation makes the advertisement "deceptive." *Id.* at 633 (quoting OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1982)).

103. *Id.* at 639-47. The advertisement was for the solicitation of clients who the intrauterine device (IUD) may have harmed, and read in pertinent part:

The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-time deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee

legal advertisements;¹⁰⁴ and (3) disclosure requirements relating to the advertisement of contingent fees.¹⁰⁵

The *Zauderer* Court applied a combination of the *Central Hudson* test and the *Virginia Pharmacy* free flow of information rationale,¹⁰⁶ ultimately finding that prohibitions on advertisements regarding specific legal problems and illustrations are unconstitutional.¹⁰⁷ Justice White noted that the advertisement and illustration in question were not misleading and, moreover, that the state failed to present a substantial governmental interest supporting the restrictions.¹⁰⁸ Additionally, the Court held that the blanket prohibition would impede the free flow of information to consumers through the deprivation of truthful legal information.¹⁰⁹

Nevertheless, the *Zauderer* Court upheld the state's rule requiring attorneys to disclose that a client may incur legal costs, even when an attorney accepts a case on a contingent fee basis.¹¹⁰ The Court stated that "the possibility of deception is self-evident" because lay people typically do not know the difference between legal fees and legal costs.¹¹¹ Finding that disclosure requirements do not place as great a burden on advertising interests as total bans,¹¹² the Court concluded that the requirements were constitutional because they were reasonably calculated to promote the state's interest in preventing consumer deception.¹¹³

basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

Id. at 631.

104. *Id.* at 647-49. Above the advertisement's written portion was a line drawing of the Dalkon Shield followed by the words, "DID YOU USE THIS IUD?" *Id.* at 630.

105. *Id.* at 650-53. The advertisement stated that the case would be taken on a contingent fee basis, but failed to explain whether the percentage would be taken out before or after court costs. The advertisement also failed to inform potential clients that they would be liable for costs, not fees, even if unsuccessful. *Id.* at 633.

106. *Id.* at 639-47.

107. *Id.* at 655-56.

108. *Id.* at 647, 649. The Court reasoned that solicitation of legal business through the use of a printed advertisement containing truthful and nondeceptive information and advice is within an attorney's First Amendment rights. *Id.* at 647. In addition, the First Amendment protects an attorney's use of accurate and nondeceptive illustrations. *Id.* at 649.

109. *Id.* at 646-47.

110. *Id.* at 653.

111. *Id.* at 652. The Court agreed with the state's argument that the statement in the advertisement informing the public that "if there is no recovery, no legal fees are owed by clients" was likely to mislead lay persons without further explanation. *Id.*

112. *Id.* at 650-51. The Court recognized that a protection from the compulsion to speak may be included under the First Amendment, but that the "State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available." *Id.* at 651.

113. *Id.* at 651.

In 1988, the Court refined the parameters of attorney advertising and solicitation, this time in the context of targeted, direct-mail solicitation.¹¹⁴ In *Shapero v. Kentucky Bar Ass'n*,¹¹⁵ an attorney requested approval from the state's Attorney Advertising Commission (AAC) for a letter that the attorney proposed sending to people involved in foreclosure suits.¹¹⁶ The AAC refused to approve the letter because it violated a Bar rule prohibiting targeted, direct-mailings.¹¹⁷ The Court, however, did not accept this decision, holding that a state cannot ban speech "merely because it is more efficient; the state may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable."¹¹⁸ Further, Justice Brennan, writing for the majority, stated that the correct inquiry is not "whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."¹¹⁹ Likewise, the Court

114. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

115. 486 U.S. 466 (1988).

116. *Id.* at 469. The proposed letter read:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep you home by ORDERING your creditor [sic] to STOP and give you more time to pay them.

You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

Id.

117. *Id.* at 469-70. The Attorneys Advertising Commission (AAC) denied approval for Shapero's letter based upon the Bar's adoption of the American Bar Association's (ABA) Rule 7.3, which provided in pertinent part:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1984).

118. *Shapero*, 486 U.S. at 473-74. Justice Brennan stated that the state may not justify a restriction on a particular letter because an attorney mailed it to those people who would be most interested in receiving it. *Id.*

119. *Id.* at 474. Justice Marshall, in his *Ohralik* concurrence, recognized that the mode of communication was an important consideration when he stated: "What is objectionable about Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 470 (1978) (Marshall, J., concurring in part and concurring in judgment).

held that targeted, direct-mail solicitation does not pose the same risks of overreaching as in-person solicitation.¹²⁰ Moreover, although a mailing is "targeted," this does not connote that the mailing invades one's privacy any more than a general mailing.¹²¹ Finally, because there were alternative ways to regulate this activity, such as requiring submission of a sample letter to a state agency,¹²² the total ban on targeted direct-mail solicitation violated the First Amendment.¹²³

In the years following *Shapero*, state courts, unhappy with the results of *Shapero*, attempted to limit its holding through reliance on the potential effect of advertising and solicitation on recipients.¹²⁴ Consequently, state

120. *Shapero*, 486 U.S. at 475. The Court reasoned that neither a printed advertisement nor a targeted, direct-mail solicitation involves the pressure of a face-to-face encounter with an attorney or the pressure for an immediate answer. *Id.* (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985)).

121. *Id.* at 476. Justice Brennan stated that "[t]he invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." *Id.* Subsequently in *McHenry v. Florida Bar*, the Eleventh Circuit refused to equate the invasion of privacy resulting from targeted, direct-mail solicitation with the presence of anti-abortion protestors on a front lawn in *Frisby v. Schultz*, 487 U.S. 474, 476 (1988), and noise directed at homes from sound trucks in *Kovacs v. Cooper*, 336 U.S. 77, 79 (1949). *McHenry*, 21 F.3d 1038, 1044 (11th Cir. 1994), *rev'd on other grounds*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

122. *Shapero*, 486 U.S. at 476-78 (listing various alternatives to absolute ban on targeted, direct-mail solicitation). The Court suggested that a less restrictive way to avoid mistakes and abuses is to require lawyers to file copies of mailings with a state agency. *Id.* at 476. Additionally, the agency may require the lawyers to prove the validity of their advertisements, to reveal the source of their information, to place a label on the materials identifying them as advertisements or to place a disclaimer upon the material directing consumers how to report advertising that they believe is unethical or misleading. *Id.* at 477-78.

123. *Id.* at 480.

124. See, e.g., *Norris v. Alabama State Bar*, 582 So. 2d 1034 (Ala.) (failing to recognize First Amendment protection for targeted, direct-mail solicitation), *cert. denied*, 502 U.S. 957 (1991); *Florida Bar: Petition to Amend the Rules Regulating the Fla. Bar — Advertising Issues*, 571 So. 2d 451 (Fla. 1990) (upholding imposition of thirty-day ban on targeted direct-mail solicitation of potential personal injury and wrongful death clients due to emotional condition of recipients); *In re Anis*, 599 A.2d 1265 (N.J.) (affirming disciplinary actions against attorney by focusing upon vulnerable condition of letter recipients), *cert. denied*, 504 U.S. 956 (1992); see also *Kinsler*, *supra* note 33 (noting that state court attempts to limit *Shapero* are unconstitutional).

In re Anis stemmed from the Pan American Flight 103 crash over Lockerbie, Scotland. *In re Anis*, 599 A.2d at 1267. Alexander Lowenstein was one of the victims. *Id.* His remains were identified on January 3, 1989 and the following day, two attorneys sent his father, Peter Lowenstein, a solicitation letter. *Id.* The New Jersey Supreme Court upheld a public reprimand for the solicitation based in part upon a rule prohibiting "direct solicitation of clients who are vulnerable and probably not able to make a reasoned judgment." *Id.* at 1269-70. The court stated that "an ordinarily prudent attorney would recognize that within the hours and days following a tragic disaster, families would be particularly weak and vulnerable." *Id.* at 1270. Further, the court stated that "[w]e have no doubt . . . that the commercial speech guarantees of the First Amendment do not protect attorney conduct that is universally regarded as deplorable and beneath common decency . . ." *Id.*

actions seemed to contravene *Shapero's* clear directive that the relevant inquiry is whether the mode of communication poses a serious risk that lawyers will exploit susceptibility.¹²⁵ Additional decisions also attempted to limit *Shapero's* finding by arguing that the case's holding only applies to foreclosure matters.¹²⁶

Finally, in *Board of Trustees v. Fox*,¹²⁷ the Court took a step backward from the comprehensive protection given to attorney advertising and solicitation. In *Fox*, the State University of New York refused to allow American Future Systems, a household item retailer, to conduct product demonstrations in student dormitory rooms.¹²⁸ The Court applied the *Central Hudson* test to determine whether the university's action was constitutional.¹²⁹ In doing so, however, the Court modified the test's fourth prong to simply require:

a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.¹³⁰

125. *Shapero*, 486 U.S. at 474.

126. *In re Anis*, 599 A.2d 1265 (N.J. 1992). The *In re Anis* court distinguished *Shapero* based upon the fact that *Shapero* addressed foreclosure rather than personal injury or death. *Id.* at 1269. However, the *Shapero* Court cited *In re Von Wiegen*, a New York case that recognized First Amendment protection for the targeted, direct-mail solicitation of disaster victims. *Shapero*, 486 U.S. at 479 (citing *In re Von Wiegen*, 63 N.Y.2d 163, 179 (1984), *cert. denied*, 472 U.S. 1007 (1985)); see Kinsler, *supra* note 33, at 29 (recognizing *In re Von Wiegen* reference in *Shapero*). Therefore, it can be reasonably inferred that *Shapero* was intended to go beyond the limited scope of foreclosure matters.

127. 492 U.S. 469 (1989).

128. *Id.* at 472.

129. *Id.* at 475.

130. *Id.* at 480 (citations omitted). An important factor in determining whether there is a reasonable "fit" between the legislative means and ends is the availability of "numerous and obvious less-burdensome alternatives." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993). In *Discovery Network*, the city was unable to establish a reasonable fit between its interests in safety and aesthetics and an ordinance prohibiting distribution of "commercial handbills" through newsracks on public property. *Id.* at 1510. The Court pointed out that the city failed to consider regulating newsracks according to size, shape, appearance or number as opposed to a complete ban. *Id.* It was also important that the newsracks in question numbered approximately 62 out of an estimated 1500-2000 newsracks. *Id.* The combination of these factors, with the fact that the ordinance discriminated on the basis of content, led the Court to hold the ordinance unconstitutional. *Id.* at 1517.

This decision severely curtailed the "least restrictive" means test that formerly defined the test's fourth prong.¹³¹

Thus, Supreme Court precedent up until 1995 established that total bans on targeted, direct-mail solicitation were unconstitutional. Additionally, the Court established that the *Central Hudson* test as modified by *Fox* was the definitive standard for judging restrictions on commercial speech.¹³² Nonetheless, an open question remained as to whether a partial restriction upon targeted, direct-mail solicitation could pass constitutional muster. This lingering question prompted the Supreme Court's decision in *Florida Bar v. Went For It, Inc.*¹³³

IV. ANALYSIS: *FLORIDA BAR V. WENT FOR IT, INC.*

A. Narrative Analysis

1. The Majority Opinion

In *Florida Bar v. Went For It, Inc.*, the Supreme Court held that a state can place a thirty-day time ban on the targeted, direct-mail solicitation of potential personal injury and wrongful death clients.¹³⁴ The original dis-

131. *Fox*, 492 U.S. at 480; see BARRON ET AL., *supra* note 92, at 1045 (stating that *Fox* "materially eroded" fourth part of *Central Hudson* test); Hill, *supra* note 30, at 407-09 (discussing how *Fox* modified the "least restrictive" means test). Some argue that *Fox* represents Chief Justice Rehnquist's belief that legal advertising should be evaluated using a substantive due process analysis. Albert P. Mauro, Jr., Comment, *Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931 (1992). By implementing what appears to be a rational basis analysis, the Court is deferring to governmental judgment and allowing broader speech restrictions. *Id.* at 1932-33. Even though the *Fox* Court specifically stated that it was not using a rational basis analysis, it nevertheless rejected the least restrictive means analysis. *Fox*, 492 U.S. at 480. Further, in declining to apply a least restrictive means analysis, the Court recognized the difficulty in determining the point at which restrictions overcome their objectives and allowing governmental regulation of commercial speech, an area traditionally subject to such regulation. *Id.* at 480-81 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)).

132. *Fox*, 492 U.S. at 479-81. This argument remains true even though the Court in *Fox* did not recognize the fit requirement as a modification of *Central Hudson*. *Id.* at 480. The Court stated, "we have not gone so far as to impose . . . the burden of demonstrating . . . that the manner of restriction is absolutely the least severe that will achieve the desired end." *Id.* However, Justice Blackmun, in his dissent, noted that in order to reach this conclusion, the majority had to recharacterize language used in earlier cases. *Id.* at 486. (Blackmun, J., dissenting). Justice Blackmun further noted that, "[i]ndeed, to reach its result, the majority must characterize as 'dicta' the Court's reference to 'least-restrictive-means' analysis in *Zauderer* . . . although this reference seems integral to the Court's holding" *Id.* at 486 n.1 (Blackmun, J., dissenting) (citing *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 644 (1985)); see also Hill, *supra* note 30, at 408-09 (discussing Justice Blackmun's dissent in *Fox*).

133. 115 S. Ct. 2371 (1995).

134. *Id.* at 2374. The Supreme Court ruled that the thirty-day ban on targeted, direct-mail solicitation of potential personal injury and wrongful death clients did not violate First and Fourteenth Amendment protection afforded attorney advertising as commercial speech. *Id.*

pute in *Went For It* arose when an attorney and his referral service filed a suit to enjoin the enforcement of Rule 4-7.4(b)(1)(A) of the Rules Regulating the Florida Bar.¹³⁵ Agreeing that there were no genuine issues of material fact, both sides submitted cross motions for summary judgment.¹³⁶ The district court referred the case to a magistrate, who determined that the ban was constitutional.¹³⁷ The district court, however, disagreed with the magistrate's finding and entered summary judgment in the attorney's favor.¹³⁸ The Eleventh Circuit affirmed the district court's ruling, finding that the ban violated the First Amendment's protection of free speech.¹³⁹ The Supreme Court granted certiorari and reversed the Eleventh Circuit's decision.¹⁴⁰

Justice O'Connor, writing for the majority, reviewed relevant Supreme Court cases involving commercial speech from *Valentine v. Chrestensen*¹⁴¹ to *Fox* and used their reasoning to support the Court's decision.¹⁴² Justice O'Connor recognized that commercial speech was once afforded no protection from governmental restrictions,¹⁴³ but that it is presently covered under the First Amendment umbrella.¹⁴⁴ Justice

135. *Id.* McHenry and his lawyer referral service, *Went For It, Inc.*, asserted that but for Rule 4-7.4(b)(1)(A) and 4-7.8(a), they would send targeted direct-mail solicitation letters within thirty days of an accident. *Id.* For the text of Rules 4-7.4(b)(1)(A) and 4-7.8(a), see *supra* note 16.

136. *Went For It*, 115 S. Ct. at 2374.

137. *Id.* The Magistrate Judge found that the Florida Bar presented substantial governmental interests to justify the restriction. *Id.* The judge held that the ban sufficiently furthered interests in the protection of the privacy and tranquility of recent accident victims and their families, and safeguarded against undue influence and overreaching, with an undercurrent of professionalism, without unnecessarily restricting speech. *Id.*

138. *Id.* at 2374. The district court reversed on the authority of *Bates*. *Id.* (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

139. *Id.* at 2375.

140. *Id.*

141. 316 U.S. 52 (1942). For a discussion of *Valentine*, see *supra* note 40 and accompanying text.

142. *Went For It*, 115 S. Ct. at 2375-76.

143. *Id.* at 2375 (recognizing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)). Justice O'Connor noted the rule set forth in *Valentine*, i.e., "while the First Amendment guards against government restriction of speech in most contexts, 'the Constitution imposes no such restraint on government as respects purely commercial advertising.'" *Id.* (quoting *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942)).

144. *Id.* (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). The Court recognized that *Virginia Pharmacy* was the first case extending First Amendment protection to commercial speech. *Went For It*, 115 S. Ct. at 2375. Justice O'Connor stated that *Virginia Pharmacy* rejected the argument asserting that commercial speech lacks any value. *Id.* (citing *Virginia Pharmacy*, 425 U.S. at 762). However, *Virginia Pharmacy* expressly declined to extend such protection to legal commercial speech. *Id.* (citing *Virginia Pharmacy*, 425 U.S. at 773 n.25). One year later, the Court expanded First Amendment protection to legal advertising in *Bates* under the reasoning of *Virginia Pharmacy*. *Id.* (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

O'Connor then noted that since *Bates* extended First Amendment protection to legal advertising, Supreme Court precedent has firmly established that this protection is appropriate.¹⁴⁵ However, Justice O'Connor stated that the protection conferred upon commercial speech is not absolute, and that if a distinction between commercial and noncommercial speech is not maintained, the greater protection conferred upon the latter would be diluted.¹⁴⁶ Consequently, the Court announced that it would implement an intermediate level of review and apply a three-part version of the *Central Hudson* test to determine the ban's constitutionality.¹⁴⁷ The Court's revised *Central Hudson* test consisted of the following parts: (1) substantial governmental interest; (2) direct relationship; and (3) narrowly drawn.¹⁴⁸ The *Went For It* Court did not address the traditional first prong of the *Central Hudson* test, dictating that commercial speech must not be misleading or illegal, because the Bar did not suggest that the proposed targeted, direct-mail solicitations would be false or deceptive.¹⁴⁹

The Florida Bar presented two substantial government interests in support of the ban.¹⁵⁰ First, the Bar claimed a substantial interest in protecting the privacy and tranquility of people from offensive, unrequested legal advice where those people, or their loved ones, recently suffered from personal injury or death.¹⁵¹ Second, the Bar stated its desire to pro-

145. *Went For It*, 115 S. Ct. at 2375 (citing *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *In re R.M.J.*, 455 U.S. 191, 199 (1982)).

146. *Id.* (citing *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 467, 481 (1989); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). The Court quoted the language of *Fox* and *Ohralik* noting that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Id.* (quoting *Fox*, 492 U.S. at 477 (quoting *Ohralik*, 436 U.S. at 456)). Further, "[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.* (quoting *Fox*, 492 U.S. at 481 (quoting *Ohralik*, 436 U.S. at 456)).

147. *Id.* at 2375-76. The *Central Hudson* test, as it appears with the *Fox* modification, contains the following four parts: (1) the commercial speech must not be misleading or illegal; (2) the government must propose a substantial interest justifying the regulation; (3) the regulation must directly advance the governmental interest; and (4) the regulation must be narrowly drawn and there must be evidence of a reasonable fit between the legislative means and ends. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). For a discussion of the *Central Hudson* test, see *supra* notes 87-94 and accompanying text. For a discussion of the *Fox* modification of the *Central Hudson* test, see *supra* notes 92, 127-31 and accompanying text.

148. *Went For It*, 115 S. Ct. at 2376.

149. *McHenry*, 21 F.3d 1038, 1042 (11th Cir. 1994), *rev'd on other grounds*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

150. *Went For It*, 115 S. Ct. at 2376.

151. *Id.* As originally presented, this interest did not include language regarding unsolicited legal advice, but rather included only a general privacy con-

tect the reputation of Florida lawyers from the negative impressions that citizens often associate with targeted, direct-mail solicitation of personal injury and wrongful death clients.¹⁵² Justice O'Connor held that these interests were substantial and accordingly, satisfied the first prong of the Court's three-part version of the *Central Hudson* test.¹⁵³

Next, the Court discussed the second prong of the revised *Central Hudson* test and found that the regulation "direct[ly] and material[ly]" advanced the proposed interests in privacy and professionalism.¹⁵⁴ Justice O'Connor reasoned that the Bar's 106-page summary of a two year study of legal advertising and solicitation provided sufficient evidence of the relationship between the state regulation and asserted interests.¹⁵⁵ The Court found that the study's statistical and anecdotal data sufficiently demonstrated that Florida citizens viewed direct-mail solicitations as an in-

cern. *McHenry*, 21 F.3d at 1042. Additionally, although the Court did not phrase the interest in terms of offensiveness, it conceded as much later in the opinion. See *Went For It*, 115 S. Ct. at 2379 (discussing interest in terms of offensiveness).

152. *Went For It*, 115 S. Ct. at 2376. The second interest advanced by the Bar to the Supreme Court was different from the second interest presented to the Eleventh Circuit. *McHenry*, 21 F.3d at 1042. The second interest introduced to the Eleventh Circuit was "protecting persons traumatized by recent injury to themselves or members of their family who are likely to be in a state of mind which inhibits objective evaluation of a personalized solicitation from a lawyer." *Id.*

153. *Went For It*, 115 S. Ct. at 2376. Finding that the interest in professionalism was substantial, the Court stated that the "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Id.* (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)); see also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (recognizing that state has strong interest in maintaining professional standards); *Cohen v. Hurley*, 366 U.S. 117, 124 (1961) (noting importance of state interest in professionalism because of attorneys' roles as clients' agents, court officers and administrators of justice). Regarding the interest in privacy, Justice O'Connor quoted *Edenfield v. Fane* that stated "the protection of potential clients' privacy is a substantial state interest." *Went For It*, 115 S. Ct. at 2376 (quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1799 (1993)). For a detailed discussion of the governmental interest in protecting privacy, see *infra* notes 210-25, 233-34 and accompanying text. For a detailed discussion of the governmental interest in maintaining professionalism, see *infra* notes 235-51 and accompanying text.

154. *Went For It*, 115 S. Ct. at 2377 (quoting *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1588 (1995) (quoting *Edenfield*, 113 S. Ct. at 1798)). "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983). The *Edenfield* Court defined the burden upon the state as a "demonstrat[ion] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Went For It*, 115 S. Ct. at 2377. (quoting *Edenfield*, 113 S. Ct. at 1800). "Mere speculation or conjecture" is insufficient. *Id.* (quoting *Edenfield*, 113 S. Ct. at 1800).

155. *Went For It*, 115 S. Ct. at 2377. In *Edenfield*, the state sought to prohibit all in-person solicitation by CPAs. 113 S. Ct. 1792 (1993). Because the state offered no statistical or anecdotal evidence supporting its interests in avoiding fraud and overreaching, and maintaining professional independence, the Court struck down the restriction. *Id.* at 1800-02.

vasion of privacy and that these solicitations negatively impacted upon the legal profession's image.¹⁵⁶ Consequently, the Court concluded that the ban satisfied *Central Hudson's* second prong.¹⁵⁷

Finally, the Court found that the thirty-day ban satisfied the third part of the revised *Central Hudson* test based upon the reasonable fit between the means employed by the state and its stated goal.¹⁵⁸ Finding the ban "reasonably well-tailored" and recognizing the plethora of alternate channels through which persons can find an attorney, the Court found no fault with the state's restriction.¹⁵⁹ Justice O'Connor denied the existence of "'numerous and obvious less-burdensome alternatives.'" ¹⁶⁰ Thus, be-

156. *Went For It*, 115 S. Ct. at 2377-78.

157. *Id.* at 2378. Judge Black of the Eleventh Circuit relied upon *Shapero v. Kentucky Bar Ass'n*, when he found that privacy was not a substantial governmental interest. *Id.* (noting *McHenry*, 21 F.3d 1038 (11th Cir. 1994), *rev'd*, Florida Bar v. *Went For It, Inc.*, 115 S. Ct. 2371 (1995)). The *Went For It* Court distinguished *Shapero* on three points: (1) *Shapero's* treatment of privacy was superficial and addressed the problem of overreaching, not invasion of privacy; (2) the ban in *Shapero* was upon all targeted, direct-mail solicitation; and (3) the Kentucky Bar presented no evidence showing any real harms. *Id.* The Court recognized Justice Brennan's reasoning in *Shapero* that "[t]he invasion [of privacy] . . . occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient." *Id.* (citing *McHenry*, 21 F.3d at 1044). However, Justice O'Connor stated that the privacy at issue in *Went For It* stemmed from the confrontation, not from the lawyer's initial knowledge of the circumstances. *Id.* at 2379. The Court distinguished an untargeted, direct-mail solicitation from the targeted, direct-mail solicitation at issue because it does not involve a knowing invasion of the recipient's privacy and therefore, is less damning to the reputation of the legal community. *Id.*

Justice O'Connor also distinguished *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). *Went For It*, 115 S. Ct. at 2379. In *Bolger*, the federal government attempted to prohibit direct-mail advertisements for contraceptives. *Id.* (citing *Bolger*, 463 U.S. at 60). The Court struck down the bans, stating that the recipient could avoid the advertisements by refusing to read them and disposing of them. *Id.* (citing *Bolger*, 463 U.S. at 72). The *Went For It* Court reasoned that even though disposal would alleviate some effects of the intrusion, it would not influence the way the recipient viewed the soliciting attorney. *Id.*

158. *Went For It*, 115 S. Ct. at 2380-81. Justice O'Connor stated that the Court was employing the *Fox* reasonable "fit" test, not the more lax rational basis review. *Id.* at 2380.

159. *Id.* at 2380-81. The majority addressed two assertions of the dissent, both of which asserted that the ban was defective: (1) the ban did not differentiate between degrees of injury; and (2) the ban deprived vulnerable clients of legal advice when they are likely to be subjected to inquiries from adverse parties such as insurance adjusters, defense attorneys and the like. *Id.* at 2380. First, the Court stated that it would be virtually impossible to fashion a regulation with degrees of injury or grief. *Id.* Further, the Court was satisfied that the regulation was a reasonable means to achieve the state interest in maintaining professionalism. *Id.* Second, the Court recognized that the ban was of short duration and that the public has ample exposure to the legal community through television, radio, newspapers, billboards, untargeted letters and Yellow Pages for this period. *Id.* at 2380-81. Therefore, the ban both produced no appreciable harm to those in need of legal services and adequately promoted the state interests. *Id.* at 2381.

160. *Id.* at 2380 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993)).

cause the thirty-day ban met the three requirements of the reconstructed *Central Hudson* test, the Court upheld the ban's constitutionality.¹⁶¹

2. *The Dissent*

Justice Kennedy, joined by Justices Stevens, Souter and Ginsburg, dissented from the majority opinion.¹⁶² The dissent's main premise in *Went For It* was that the disputed statute concerned more than mere commercial speech.¹⁶³ Justice Kennedy agreed that *Central Hudson* should guide the discussion, but argued that because a potential client's access to the court is directly related to the speech at issue, the Court should exercise great care in applying precedent to the factual situation in *Went For It*.¹⁶⁴ The dissent noted that "what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker."¹⁶⁵

First, the dissent declared that the Bar's proposed interests were insubstantial.¹⁶⁶ Justice Kennedy stated that the majority phrased the privacy interest in terms of offensiveness to avoid the clearly applicable holding in *Shapero*.¹⁶⁷ Justice Kennedy further contended that the First Amendment does not condone restrictions upon speech merely because the speech is potentially offensive.¹⁶⁸ Additionally, regarding the interest

161. *Id.* at 2381.

162. *Id.* at 2381 (Kennedy, J., dissenting).

163. *Id.* (Kennedy, J., dissenting). Justice Kennedy stated that when an accident or wrongful death occurs, the need to investigate, gather evidence and interview witnesses is most pressing immediately after the event. *Id.* (Kennedy, J., dissenting). Time is of the essence especially when the opposing party or parties undertakes prompt inquiry. *Id.* at 2382 (Kennedy, J., dissenting). Justice Kennedy noted the illogical consequences of the thirty-day ban. *Id.* (Kennedy, J., dissenting). The dissent recognized that it is possible for victims and their families to remain unrepresented and susceptible to defense investigations for a full thirty days before attorneys are able to solicit them through targeted, direct-mail solicitation. *Id.* (Kennedy, J., dissenting). By that time, however, it may be too late to obtain adequate legal representation. *See id.* (Kennedy, J., dissenting) (noting that victims may be contacted with settlement offers).

164. *Id.* at 2382 (Kennedy, J., dissenting).

165. *Id.* (Kennedy, J., dissenting).

166. *Id.* at 2382-83 (Kennedy, J., dissenting).

167. *Id.* at 2382 (Kennedy, J., dissenting) (citing *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)). Justice Kennedy felt that *Shapero* was clearly applicable. *Id.* (Kennedy, J., dissenting). Justice Kennedy stated that *Shapero* distinguished between privacy issues implicated by direct-mail solicitation and in-person solicitation. *Id.* (Kennedy, J., dissenting) (citing *Shapero*, 486 U.S. at 475). Concentrating on the mode of communication, the *Shapero* Court found that mailings did not present the same dangers of overreaching and influencing present in in-person solicitation. *Id.* (Kennedy, J., dissenting) (citing *Shapero*, 486 U.S. at 475-76). This undermines the majority's reliance upon *Edenfield v. Fane*, which dealt solely with privacy issues implicated by in-person solicitation. *Id.* at 2376 (citing *Edenfield v. Fane*, 113 S. Ct. 1792 (1993)).

168. *Id.* at 2382-83 (Kennedy, J., dissenting). Quoting *Bolger*, the dissent noted that "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." *Id.* at 2383 (Kennedy, J., dissenting) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983)).

in professionalism, Justice Kennedy accused the majority of sanctioning censorship.¹⁶⁹ Justice Kennedy argued that support for such an interest assumes that solicitations fulfill no legitimate purpose within thirty days of an accident, which was precisely what the argument sought to prove.¹⁷⁰ In other words, the majority assumed that targeted, direct-mail solicitation is an unethical and improper practice resulting in disrespect for the profession. The majority then concluded that because of this disrespect, targeted, direct-mail solicitation is an unethical and improper practice. The dissent found, however, that the ban failed the first prong of the Court's revised *Central Hudson* test.

The dissent next found that the state failed to prove the existence of real dangers and, moreover, that the ban did not promote the proposed state interests in a "direct and material way."¹⁷¹ Justice Kennedy described the 106-page summary as "a few pages of self-serving and unsupported statements."¹⁷² Justice Kennedy noted that the summary supported the interest in professionalism, but lent little, if any, support to the interest in

Further, "the mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity." *Id.* (Kennedy, J., dissenting) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985)). Addressing the fact that the communication was mailed, Justice Kennedy recognized that *Bolger* held that the state had little interest in protecting recipients from potentially offensive mailings. *Id.* (Kennedy, J., dissenting) (citing *Bolger*, 463 U.S. at 71). Noting that people who receive mailings at their homes are not a captive audience, the dissent stated that the Constitution allows placing a burden of disposing of the mailing upon the recipients if the mailing is unwanted. *Id.* (Kennedy, J., dissenting) (citing *Bolger*, 463 U.S. at 72).

169. *Id.* at 2383 (Kennedy, J., dissenting). Justice Kennedy stated that by imposing a thirty-day solicitation ban to protect the reputation of the legal profession, "the State is doing nothing more . . . than manipulating the public's opinion by suppressing speech that informs us how the legal system works." *Id.* (Kennedy, J., dissenting).

170. *Id.* (Kennedy, J., dissenting). The dissent criticized the majority opinion, arguing that the majority assumed that the inappropriate behavior of a few lawyers would harm the entire legal community. *Id.* (Kennedy, J., dissenting). Further, Justice Kennedy noted the majority's failure to consider the impact of other forms of solicitation upon the reputation of the legal profession. *Id.* (Kennedy, J., dissenting). He noted that targeted, direct-mailings could aid in the execution of justice. *Id.* (Kennedy, J., dissenting). Justice Kennedy also accused the state of attempting to control public opinion by shielding it from the workings of the legal system. *Id.* (Kennedy, J., dissenting).

171. *Id.* at 2383-84 (Kennedy, J., dissenting) (citing *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993)).

172. *Id.* at 2384 (Kennedy, J., dissenting). The dissent noted that the summary included "no actual surveys, few indications of sample sizes or selection procedures, no explanations of methodology, and no discussion of excluded results . . . [with] no description of the statistical universe or scientific framework." *Id.* (Kennedy, J., dissenting). He recognized that only 34 pages dealt with direct-mail solicitation, of which only two were a summary of a study accessing citizen attitudes to such solicitation, the rest being dedicated to commentary (some favorable). *Id.* (Kennedy, J., dissenting).

privacy.¹⁷³ Accordingly, the dissent concluded that the ban failed the second part of the *Central Hudson* test.¹⁷⁴

Finally, Justice Kennedy failed to find a reasonable fit between the proposed state interests and the ban.¹⁷⁵ In particular, the dissent believed that a significant disproportion existed between the proposed harm and the ban.¹⁷⁶ Justice Kennedy noted that the majority's claim, distinguishing between degrees of grief or injury would be difficult, was unconvincing considering criminal law's dependence upon line drawing.¹⁷⁷ The dissent further rejected the assumption that all or most legal advice is unwelcome in the days immediately following an accident.¹⁷⁸ Justice Kennedy recognized that victims of lesser injuries are unlikely to be upset, and that some, without legal guidance, may falsely conclude that their claims are worthless.¹⁷⁹ Regarding more serious injuries, the dissent stated that timely legal action is essential, and that the majority's proposed use of other forms of communication, implicitly acknowledged the need for the very representation that the ban sought to prohibit.¹⁸⁰ Justice Kennedy asserted that uneducated people who lack communication skills and knowledge of the legal system are the people most disadvantaged by the desire to maintain a dignified bar.¹⁸¹

The dissent also maintained that the majority ignored the fact that problems involving targeted, direct-mail solicitation are largely self-policing.¹⁸² Justice Kennedy based this notion upon a recognition that people will not hire attorneys who offend them.¹⁸³ Further, the dissent noted that Florida allows clients to rescind some contracts with lawyers within certain time limitations.¹⁸⁴ The dissent recognized that targeted, direct-mail solicitations provide potential clients information, which assists the

173. *Id.* (Kennedy, J., dissenting).

174. *Id.* at 2383 (Kennedy, J., dissenting).

175. *Id.* at 2384 (Kennedy, J., dissenting).

176. *Id.* at 2384 (Kennedy, J., dissenting). Justice Kennedy stated that "a flat ban prohibits far more speech than necessary to serve the purported state interest." *Id.* (Kennedy, J., dissenting). Further, Justice Kennedy found "a wild disproportion between the harm supposed and the speech ban enforced." *Id.* (Kennedy, J., dissenting).

177. *Id.* at 2384-85 (Kennedy, J., dissenting).

178. *Id.* at 2385 (Kennedy, J., dissenting). Justice Kennedy stated that there was no justification for the state's assumption that an attorney's advice would be unwelcomed by those who "must at once begin assessing their legal and financial position in a rational matter." *Id.* (Kennedy, J., dissenting).

179. *Id.* (Kennedy, J., dissenting).

180. *Id.* (Kennedy, J., dissenting).

181. *Id.* at 2385 (Kennedy, J., dissenting).

182. *Id.* (Kennedy, J., dissenting). Justice Kennedy suggested that the "[t]he reasonableness of the State's chosen methods of redressing perceived evils can be evaluated, in part, by a commonsense consideration of other possible means of regulation that have not been tried." *Id.* (Kennedy, J., dissenting).

183. *Id.* (Kennedy, J., dissenting).

184. *Id.* (Kennedy, J., dissenting).

client in making an informed choice about legal representation.¹⁸⁵ Justice Kennedy stated that if this form of communication reveals unpopular aspects of personal injury and wrongful death litigation, a reformation of the system should occur, rather than a suppression of information.¹⁸⁶ Therefore, the dissent concluded that the ban failed the third part of the *Central Hudson* test.¹⁸⁷

In conclusion, the dissent charged the majority with attempting to conceal the law's financial aspect from the public, at the expense of society's less advantaged.¹⁸⁸ The dissent stated that promoting the legal profession's public image does not justify the suppression of truthful information.¹⁸⁹ Justice Kennedy asserted that "full and rational discussion furthers sound regulation and necessary reform."¹⁹⁰ The dissent concluded that the majority violated the "'general rule . . . that the speaker and the audience, not the government, assess the value of the information presented.'" ¹⁹¹

B. Critical Analysis

1. *The Central Hudson Test*

As stated by Justice Kennedy, an honest constitutional evaluation of the thirty-day ban requires a careful and faithful adherence to precedent.¹⁹² Such an evaluation must be free of self-serving objectives and emotional inclinations. When Supreme Court precedent is properly applied to the ban at issue in *Went For It*, it clearly fails to pass constitutional muster.

185. *Id.* (Kennedy, J., dissenting). Justice Kennedy recognized the great demand for legal services in our society. *Id.* (Kennedy, J., dissenting) (citing Laura Mansnerus, *Looking for an Attorney? Here's Counsel*, N.Y. TIMES, June 11, 1995, § 6, at 1) (indicating that 68% of respondents to 1993 poll said that they had used lawyer within past five years). Because of this demand, Justice Kennedy stated that "the use of modern communication methods in a timely way is essential if clients . . . are to be advised and informed of all of their choices and rights in selecting an attorney." *Id.* (Kennedy, J., dissenting). Further he recognized that "[n]othing in the record shows that . . . [targeted, direct-mail solicitations] do not at least serve the purpose of informing the prospective client that he or she has a number of different attorneys from whom to choose, so that the decision to select counsel . . . can be deliberate and informed." *Id.* (Kennedy, J., dissenting).

186. *Id.* at 2386 (Kennedy, J., dissenting). Justice Kennedy stated that "[t]he Court's approach . . . does not seem to be the proper way to begin elevating the honor of the [legal] profession." *Id.* (Kennedy, J., dissenting).

187. *Id.* at 2384 (Kennedy, J., dissenting).

188. *Id.* at 2386 (Kennedy, J., dissenting).

189. *Id.* (Kennedy, J., dissenting). Justice Kennedy recognized the lack of constitutional authority for the proposition that states may promote the "public image of the legal profession by suppressing information about the profession's business aspects." *Id.* (Kennedy, J., dissenting).

190. *Id.* (Kennedy, J., dissenting).

191. *Id.* at 2386 (Kennedy, J., dissenting) (quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993)).

192. *Id.* at 2382 (Kennedy, J., dissenting).

To determine whether the Supreme Court was justified in its conclusion, *Went For It* must be examined under the four-part *Central Hudson* test as modified by *Fox*.¹⁹³ First, the court must determine whether the speech in the *Went For It* advertisement was misleading.¹⁹⁴ Second, the court must evaluate the proposed governmental interests to determine whether they are substantial enough to justify the ban.¹⁹⁵ Third, the court must decide whether the ban directly advances the proposed governmental interests.¹⁹⁶ Fourth, the court must determine whether the restriction is narrowly drawn, i.e., whether there is a reasonable fit between the methods employed and the proposed governmental interests.¹⁹⁷

The first prong of the *Central Hudson* test involves consideration of whether the commercial speech is misleading or illegal.¹⁹⁸ In *Went For It*, Justice O'Connor did not address this prong and therefore, based her analysis on a three-part version of the test.¹⁹⁹ Justice O'Connor presumably used this revised test because the Eleventh Circuit recognized that the Florida Bar did not suggest that the targeted, direct-mail solicitations were false or deceptive.²⁰⁰ Consequently, because the Bar did not contest the first prong of the original *Central Hudson* test and it was unnecessary to consider that prong on review. Although the *Went For It* Court utilized a three-part version of this test,²⁰¹ this Note will employ the traditional four-part *Central Hudson* test for purposes of the critical analysis.

The second prong of the *Central Hudson* test involves an analysis of the proposed governmental interests.²⁰² The Bar presented two interests: (1) the protection of people's tranquility and privacy from offensive, unrequested legal advice;²⁰³ and (2) the maintenance of the Florida Bar's professional image.²⁰⁴ While Justice O'Connor found these interests substantial,²⁰⁵ neither proved to be so when carefully analyzed under the Court's commercial speech precedent.²⁰⁶

193. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). For a discussion of the *Central Hudson* test, see *supra* notes 87-94 and accompanying text. For a discussion of *Fox* and its modification of the *Central Hudson* test, see *supra* notes 92, 127-31 and accompanying text.

194. *Central Hudson*, 447 U.S. at 566.

195. *Id.*

196. *Id.*

197. *Id.*; *Fox*, 492 U.S. at 480.

198. *Central Hudson*, 447 U.S. at 566.

199. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2376 (1995).

200. *McHenry*, 21 F.3d 1038, 1042 (11th Cir. 1994), *rev'd on other grounds*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

201. *Went For It*, 115 S. Ct. at 2376.

202. *Central Hudson*, 447 U.S. at 566.

203. *Went For It*, 115 S. Ct. at 2376.

204. *Id.*

205. *Id.*

206. *See id.* at 2382-83 (Kennedy, J., dissenting) (finding proposed state interests insubstantial).

The Bar first proposed a governmental interest in the protection of recipients' privacy and tranquility from unwanted legal solicitation.²⁰⁷ Realizing that the right to privacy was insufficient to sustain the ban alone, the Bar added the element of offensiveness to bolster its argument.²⁰⁸ However, careful consideration of the privacy and offensiveness interests

207. *Id.* at 2376.

208. Compare *McHenry*, 21 F.3d 1038, 1042 (11th Cir. 1994), *rev'd on other grounds*, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) (recognizing right to privacy as state interest) and *Went For It*, 115 S. Ct. at 2376 (recognizing right to privacy coupled with offensiveness as state interest). At the district and circuit court levels, the Bar advocated an interest in the right to privacy. See also *McHenry*, 808 F. Supp. 1543, 1547 (M.D. Fla. 1992) (finding no significant invasion of privacy because no captive audience), *aff'd*, 21 F.3d 1038 (11th Cir. 1994), *rev'd on other grounds*, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995). However, once the case reached the Supreme Court, the interest was phrased as the right to privacy coupled with offensive solicitation. *Went For It*, 115 S. Ct. at 2376.

In the context of advertising and solicitation that does not occur in-person, the Court has repeatedly refused to recognize privacy as a substantial interest. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) (stating privacy is invaded when attorney learns of incident, not when solicitation is mailed); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985) (stating newspaper advertisements did not invade privacy of readers); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465-66 (1978) (distinguishing significant invasion of privacy involved in in-person solicitation from slight invasion associated with print advertisements); *In re Primus*, 436 U.S. 412, 435 (1978) (noting that letter "involve[s] no appreciable invasion of privacy") (footnote omitted).

However, when in-person solicitation is involved, the Court has reasonably concluded that the invasion of privacy is significant. See *Edenfield v. Fane*, 113 S. Ct. 1792, 1799 (1993) (stating in context of in-person solicitation, privacy is substantial interest); *Ohralik*, 436 U.S. at 465-66 (recognizing in-person solicitation involves appreciable invasion of privacy); *In re Primus*, 436 U.S. at 435 (noting that in-person solicitation entails significant invasion of privacy); *Breard v. City of Alexandria*, 341 U.S. 622, 644 (1951) (stating that homeowners' privacy was paramount to publisher's desire to use best form of solicitation, i.e., in-person solicitation).

The Supreme Court has also held that the possibility that recipients and/or readers of printed advertisement might take offense to their contents, does not justify restriction. See *Zauderer*, 471 U.S. at 648 (stating that offense taken by members of bar is insufficient to justify regulation); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) (stating government cannot regulate speech based on offensiveness when obscenity is not involved); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) (stating "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression"); see also *Cohen v. California*, 403 U.S. 15, 21 (1971) (stating that readers of objectionable material can "effectively avoid further bombardment of their sensibilities simply by averting their eyes"). The fact that the reader is exposed to the material in his or her home is irrelevant unless he or she is a captive audience. See *Bolger*, 463 U.S. at 72 (finding that people who receive written advertisements at home do not constitute captive audience because they can easily dispose of material); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980) (stating that regulation of intrusive material depends upon captive audience); cf. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (finding homeowner subjected to protesters on front lawn was captive audience); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (holding that homeowners subject to noise projected from sound truck constitute captive audience).

demonstrate that neither is capable of sustaining the ban.²⁰⁹ Therefore, the state should not be able to justify the ban by combining these two insubstantial interests in an attempt to cloud the issues.

When addressing interests in privacy, the Supreme Court weighs the right to privacy against the interests in the free flow of information.²¹⁰ The privacy issue has existed in one form or another since the Supreme Court began to recognize that the First Amendment protects commercial speech.²¹¹ In *Virginia Pharmacy*, for example, the Court stated that consumers and society at large have an interest in the free flow of information.²¹² The Court also held that a state may not protect its citizens by withholding information.²¹³ Such information must be available to facilitate informed decision-making.²¹⁴ Similarly, the *Bates* Court noted that even though advertisements do not provide all the information necessary to choose an attorney, they provide a portion of the information requisite to reach an informed decision.²¹⁵ Although these two decisions do not directly address the privacy interest, their free flow of information discussions implicate constitutional principles that include privacy.²¹⁶ There-

209. For a discussion of the right to privacy, see *infra* notes 210-25, 233-34 and accompanying text. For a discussion of offensive solicitation, see *infra* notes 226-32 and accompanying text.

210. See *Ibanez v. Florida Dept. of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994) (noting value of free flow of information) (quoting *Zauderer*, 471 U.S. at 646); *Zauderer*, 471 U.S. at 646 (recognizing importance of free flow of truthful information); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977) (reasoning that even though advertising does not provide all information necessary to make informed decision, some information is better than none); *Carey*, 431 U.S. at 700 (noting individual and societal interests implicated by free flow of information); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-65 (1976) (noting consumer and societal interests in free flow of information).

211. *Breard*, 341 U.S. at 622. *Breard* was one of the Supreme Court's early attempts to deal with First Amendment protection of commercial speech. *Id.* The Court recognized that the constitutionality of an ordinance requiring the consent of property owners before door-to-door solicitations were allowed, involved a balancing of the right to privacy against the right to solicit magazine subscriptions in an effective way. *Id.* at 644. In *Breard*, the right to privacy prevailed. *Id.* at 645. However, in 1976, *Virginia Pharmacy* recognized that First Amendment protection extended to commercial speech. 425 U.S. at 762. This holding represented a change in the trend of commercial speech litigation, and brought into doubt whether privacy would prevail the next time it was the focus of a commercial speech case. See *Virginia Pharmacy*, 425 U.S. at 758-62 (noting progression of growing First Amendment protection for commercial speech).

212. *Virginia Pharmacy*, 425 U.S. at 764-66. For a discussion of *Virginia Pharmacy*, see *supra* notes 43-60 and accompanying text.

213. *Virginia Pharmacy*, 425 U.S. at 769.

214. *Id.* at 770.

215. *Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977). For a discussion of *Bates*, see *supra* notes 61-67 and accompanying text.

216. See *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965). In *Griswold*, the Court recognized that the First, Third, Fourth, Fifth and Ninth Amendments relate to privacy because a zone of privacy can be inferred from "penumbras" emanating from the enumerated rights granted in these amendments. *Id.* As *Went For*

fore, these early decisions imply that protecting an individual's privacy does not justify governmental suppression of speech.²¹⁷

Beginning with *In re Primus*, the Court overtly recognized privacy's impact on issues involving legal advertising and solicitation.²¹⁸ In *In re Primus*, the Court held that a mailing, as opposed to in-person solicitation, involves "no appreciable invasion of privacy."²¹⁹ Decided on the same day, *Ohralik* also addressed privacy in the context of in-person solicitation and stated that unlike in-person solicitation, an advertisement recipient may simply divert his or her eyes to avoid the material and, consequently, may experience a minimal invasion of privacy, if any.²²⁰ Additionally, *Zauderer* proposed that although some persons may find a print advertisement offensive, "it can hardly be said to have invaded the privacy of those who read it."²²¹ *Shapero* proposed that an invasion of privacy occurs, if at all, when the attorney learns of the incident, not when the attorney's knowledge of the incident is brought to the attention of the potential client through printed solicitation.²²² Consequently, the *Went For It* majority's reliance on *Edenfield v. Fane*²²³ is misplaced, as that case found that privacy was a substantial interest only in the context of in-person solicitation, without regard to printed advertisements.²²⁴ Thus, Supreme Court precedent clearly supports the view that *printed* advertisements and solicitations should

It dealt with the conflict between an individual's privacy in the home and the free flow of information, the First Amendment and its corresponding zones of privacy are seemingly at odds. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2376-77 (1995). The attorneys' freedom of speech is in opposition to the recipients' privacy rights. Therefore, even though Virginia Pharmacy and Bates do not explicitly address privacy, the issue is impliedly implicated through discussion of the First Amendment.

217. See *Bates*, 433 U.S. at 374 (noting importance of dissemination of incomplete information because at least some relevant information flows to consumers); *Virginia Pharmacy*, 425 U.S. at 769-70 (holding protection of citizens is not sufficient justification to restrict flow of lawful information protected by First Amendment).

218. *In re Primus*, 436 U.S. 412, 434-37 (1978). For a discussion of *In re Primus*, see *supra* notes 79-86 and accompanying text.

219. *Id.* at 435.

220. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 n.25 (1978). For a discussion of *Ohralik*, see *supra* notes 71-78 and accompanying text.

221. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985). For a discussion of *Zauderer*, see *supra* notes 101-13 and accompanying text.

222. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988). After refusing to distinguish among modes of written advertisement, the *Shapero* Court stated that the important factor in evaluating commercial speech is the mode of communication. *Id.* at 475. Because the targeted, direct-mail solicitation at issue in *Shapero* could be easily discarded, the Court found no appreciable invasion of privacy. *Id.* at 475-76. The Court distinguished in-person solicitation as involving a greater potential for invasion of privacy. *Id.* at 475 (citing *Zauderer*, 471 U.S. at 641). For a discussion of *Shapero*, see *supra* notes 114-26 and accompanying text.

223. 113 S. Ct. 1792 (1993). For a discussion of *Edenfield*, see *supra* note 78.

224. *Id.* at 1799-800; see also *Ohralik*, 436 U.S. at 464-65 (recognizing increased invasion of privacy involved with in-person solicitation); *In re Primus*, 436 U.S. 412, 435 (1978) (noting significant invasion of privacy related to in-person solicitation).

not be regulated based upon a privacy interest—this interest is not substantial enough to justify suppression of information.²²⁵

Further, the fact that a commercial advertisement offends a reader is also unable to support the ban at issue in *Went For It*. The Supreme Court precedent clearly states that offensiveness is not a substantial interest that justifies the restriction of truthful, non-misleading commercial speech.²²⁶ In *Bolger v. Youngs Drug Products Corp.*²²⁷ and *Carey v. Population Services International*,²²⁸ the Supreme Court held that total bans upon newspaper advertisements and unsolicited, mail advertisements for contraceptives violated the First Amendment.²²⁹ In both cases, the government attempted to justify the regulation based upon the advertisements' potential offensive impact.²³⁰ The Court explicitly held that this justification was not a justification at all.²³¹ The *Went For It* majority attempted to distinguish this precedent, however, arguing that the concern in *Went For It* was the offense directed at the sending agent, not the advertisement's content.²³² If this was the appropriate consideration, however, then all commercial advertisements could potentially be restricted, based upon the prospect that recipients may develop a negative impression of the advertiser's industry or profession. Surely there cannot be one rule to protect the legal profession's reputation and another to protect the reputations of all other professions. Accordingly, offensiveness is an insubstantial interest.

Additionally, the Florida Bar did not properly justify its position that targeted, direct-mail solicitation invaded the privacy associated with one's home. As stated in the *Bolger* decision, recipients can avoid invasions of their homes by averting their eyes and making a short trip to the garbage can.²³³ In addition, the Eleventh Circuit in *McHenry v. Florida Bar* recog-

225. For a discussion of the cases finding privacy a substantial interest in the context of in-person solicitation, see *supra* note 208.

226. *Zauderer*, 471 U.S. at 648 ("[T]he mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity."); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) ("[W]e have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

227. 463 U.S. 60 (1983). For a discussion of *Bolger*, see *supra* note 96.

228. 431 U.S. 678 (1977). For a discussion of *Carey*, see *supra* note 96.

229. *Bolger*, 463 U.S. at 69; *Carey*, 431 U.S. at 700.

230. *Bolger*, 463 U.S. at 71; *Carey*, 431 U.S. at 701.

231. *Bolger*, 463 U.S. at 71-72; *Carey*, 431 U.S. at 701.

232. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2379 (1995).

233. *Bolger*, 463 U.S. at 72 (stating advertisement can be avoided by "averting" eyes) (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)); *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.) (stating short trip to trash can is acceptable burden), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968); see *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980) (finding captive audience is necessary precursor to regulation of

nized that almost all targeted, direct-mail and other types of advertising "invade" the recipient's home, but they are still protected under the First Amendment.²³⁴ Therefore, where the burden upon the right to privacy is incidental, and the burden upon the flow of information is great, the First Amendment bends to accommodate the free flow of information, regardless of where the material is received.

Furthermore, the Supreme Court has rejected professionalism as a sufficient interest to justify restrictions on commercial speech in decisions involving attorney advertisement and solicitation.²³⁵ The Supreme Court first addressed professionalism in *Virginia Pharmacy*.²³⁶ Although the *Virginia Pharmacy* Court restricted its decision to the pharmaceutical profession, it plainly stated that professionalism was insufficient to justify a ban on commercial speech.²³⁷

Later, the Court affirmed this holding in *Bates* and specifically applied it to the legal profession.²³⁸ In *Bates*, the Supreme Court discussed legal professionalism with regard to advertising flat prices for routine services.²³⁹ The Court noted that the relationship between the decline of professionalism and advertising is "strained."²⁴⁰ The asserted relationship assumes that attorneys must disguise the commercial nature of their services from themselves and their clients.²⁴¹ However, only an extremely naive consumer would fail to realize that attorneys make their living by

offensive speech); *cf.* *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (stating homeowner was captive audience when protesters were demonstrating on his lawn); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (noting homeowners were captive audiences when sound trucks blasted messages at their houses); *McHenry*, 21 F.3d 1038, 1044 (11th Cir. 1994) (refusing to develop special protection for privacy in home except when recipients constitute captive audience), *rev'd on other grounds*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

234. *McHenry*, 21 F.3d at 1044.

235. *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 648 (1985) (addressing professionalism and printed advertisements); *In re Primus*, 436 U.S. 412, 435-37 (1978) (addressing professionalism and nonprofit organizations); *Bates v. State Bar of Arizona*, 433 U.S. 350, 368-72 (1977) (extensively addressing professionalism and legal profession); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766-70 (1976) (addressing professionalism in pharmaceutical profession). For a discussion of professionalism in cases prior to *Went For It*, see *infra* notes 235-51 and accompanying text.

236. *Virginia Pharmacy*, 425 U.S. at 766-70.

237. *Id.* at 773 n.25. The *Virginia Pharmacy* Court specifically stated that its decision applied only to the pharmaceutical profession and expressly reserved judgment for other professions until the relevant matter arose. *Id.*; see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-65 (1980) (recognizing that "advertising ban could not be imposed to protect ethical or performance standards of a profession") (citing *Virginia Pharmacy*, 425 U.S. at 769; *Bates*, 433 U.S. at 378).

238. *Bates*, 433 U.S. at 368-72.

239. *Id.*

240. *Id.* at 368.

241. *Id.*

charging a fee.²⁴² In fact, the American Bar Association encourages disclosure of a fee arrangement as soon as possible after an attorney-client relationship is established.²⁴³ Therefore, if an attorney must promptly discuss the commercial nature of his or her service with the client in the law office, there is no reason why such information should be unavailable before the office appointment.²⁴⁴ Additionally, Justice Blackmun noted that other dignified professions advertise without suffering an accompanying decline in reputation.²⁴⁵ In fact, the legal profession's failure to advertise may be viewed as a "failure to reach out and serve the community."²⁴⁶

A similar argument can be made with reference to targeted, direct-mail solicitation. In the areas of personal injury and wrongful death, time is of the essence. Lawyers know that an accident victim must promptly secure legal representation to be insured of fair compensation. Because of ever increasing insurance premiums, personal injury and wrongful death litigation is a very predatory area of law. Most people make this realization when they are not involved in highly emotional situations.

242. *Id.* at 368-69.

243. *Id.* at 369. The ABA advises an attorney to reach "a clear agreement with his [or her] client as to the basis of the fee charges to be made" and to do this "[a]s soon as feasible after a lawyer has been employed." *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1976)). The 1992 Model Rules of Professional Conduct contain a similar provision. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1992). Rule 1.5(b) states, "[w]hen the lawyer has not regularly represented the client, the basis or rate of fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." *Id.*

244. *Bates*, 433 U.S. at 369.

245. *Id.* at 369-70. The Court specifically noted that bankers and engineers advertise and are still regarded as dignified professionals. *Id.*

246. *Id.* at 370. Ignorance regarding the cost of legal services presents a barrier to use of attorneys. *Id.* at 370 n.22; EARL KOOS, *THE FAMILY AND THE LAW* 7 (2d ed. 1952) (indicating 47.6% of "working-class" families surveyed stated cost as primary reason for not using attorney); PHILIP MURPHY & SUSAN WALKOWSKI, *COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES* 2 (1973) (noting 514 of 1040 people surveyed cited cost as reason for failing to use attorney). However, there is evidence that this fear is unfounded. The Amicus brief filed by the United States in *Bates* reprinted the *Petition of the Board of Governors of the District of Columbia Bar for Amendments to Rule X of the Rules Governing the Bar of the District of Columbia* (1976). See Brief for United States as Amicus Curiae at 25a, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (No. 76-316). A study conducted therein found that "middle class consumers overestimated lawyers' fees by 91 percent for the drawing of a simple will, 340 percent for the reading and giving advice on a two-page installment sales contract, and 123 percent for thirty minutes of consultation and general advice." *Id.* at 24a (citing Affidavit of James G. Frierson in Consumers Union of the United States, Inc. v. American Bar Ass'n, No. 0105-R (E.D. Va. 1975)). Additionally, lack of knowledge regarding an attorney's competence tends to discourage the use of legal services. *Bates*, 433 U.S. at 370 n.23; 3 AMERICAN BAR ASS'N CONSORTIUM ON LEGAL SERVICES & THE PUBLIC, *ALTERNATIVES: LEGAL SERVICES AND THE PUBLIC* 1, at 15 (Jan. 1976) (stating that majority of people surveyed agreed that questions of competence played some role in avoidance of legal services).

However, when a person is personally involved in a tragedy, he or she may lose sight of this fact, at least until the first call from the insurance adjuster. In other words, early representation is a necessity and a reality in the practice of personal injury and wrongful death. If there is a problem, it is with the system, not with advertising. The solution should be to change the system rather than camouflage the realities of the practice.²⁴⁷ Ultimately, consumers will lose because while their opinion of the legal profession may improve, in reality, the system will remain the same.

Additionally, the Supreme Court in *Zauderer* discussed professionalism in the context of print advertisements and the use of illustrations.²⁴⁸ Justice White recognized the state's "substantial interest" in ensuring the dignified conduct of attorneys.²⁴⁹ However, the Court questioned whether the state's interest in maintaining dignity in communications between attorneys and the public was substantial enough to infringe upon First Amendment protections.²⁵⁰ Moreover, the Court was not persuaded that attorneys would engage in "undignified behavior" often enough to justify a prophylactic restriction.²⁵¹ Therefore, professionalism is not a governmental interest capable of justifying Florida's suspension of First Amendment rights for attorneys. Thus, the Bar's asserted interests in both the protection of its citizens' privacy and tranquility from intrusive, unsolicited legal advice, and professionalism are not substantial enough to satisfy *Central Hudson's* second prong.

Even assuming that the Bar's proposed interests are substantial, the *Went For It* ban fails the third part of the *Central Hudson* test. For a regulation to be constitutional, it must advance the substantial state interest in a direct and material way.²⁵² The state has the burden of proving that "the harms it recites are real and that its restriction will in fact alleviate them to

247. See *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2386 (1995) (Kennedy, J., dissenting) (stating that substantive changes are necessary to improve image of legal profession).

248. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985).

249. *Id.*

250. *Id.*

251. *Id.*; see also *Bates v. State Bar of Arizona*, 433 U.S. 350, 379 (1977) (stating belief that behavior, either good or bad, is likely to remain constant regardless of changes in professional advertising restrictions).

252. *Went For It*, 115 S. Ct. at 2377. The inquiry involves a determination of whether the "regulation directly advances the [proposed] governmental interest." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); see, e.g., *Rubin*, 115 S. Ct. at 1591-92 (stating that regulation must directly and materially support governmental interest); *Ibanez v. Florida Dept. of Business & Professional Regulation*, 114 S. Ct. 2084, 2088 (1994) (finding that regulation must materially and directly advance substantial state interest); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) (same); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (stating that regulation offering incremental support to substantial state interest is insufficient); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (holding that state must demonstrate both substantial interest and that impediment to speech is "in proportion to the interest served"); see also *Edenfield*, 113 S. Ct. at 1800 (stating that remote support is insufficient) (quoting *Central Hudson*, 447 U.S. at 564); *Cen-*

a material degree.”²⁵³ In *Went For It*, however, the Bar failed to meet this burden for several reasons. First, the Bar failed to prove the existence of real harms.²⁵⁴ The Bar offered a two-year, 106-page study supporting the existence of the privacy and reputational concerns.²⁵⁵ However, only thirty-four pages addressed targeted, direct-mail solicitation.²⁵⁶ Additionally, only two of the thirty-four pages contained information from a study of attitudes toward this type of solicitation - the balance consisted of miscellaneous comments from lawyers, citizens and newspapers.²⁵⁷ The summary contained little, if any, support for the privacy interest.²⁵⁸ This deficiency is conspicuous and detracts from the Bar’s arguments. If this is the appropriate standard of proof, then the Bar could easily justify almost any regulation simply by finding a few people who agree with the state’s position.

Second, the state failed to demonstrate that the ban would diminish the proposed harms in a material way.²⁵⁹ The relationship between the Bar’s suggested interests and the restriction is questionable because while targeted, direct-mailings concerning personal injury and wrongful death are restricted, a multitude of alternate communication channels are available for other areas of law.²⁶⁰ When identical information can penetrate

tral Hudson, 447 U.S. at 564 (noting that regulation is invalid if it offers “ineffective or remote support for the government’s purpose”).

253. *Edenfield*, 113 S. Ct. at 1800; *see Ibanez*, 114 S. Ct. at 2089 (indicating that state has burden of proving existence of harms); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985) (holding restriction was unconstitutional because state failed to establish existence of “evils” and because restriction was too burdensome).

254. *Went For It*, 115 S. Ct. at 2382-83 (1995) (Kennedy, J., dissenting).

255. *Id.* at 2377.

256. *Id.* at 2384 (Kennedy, J., dissenting).

257. *Id.* (Kennedy, J., dissenting).

258. *See id.* (Kennedy, J., dissenting) (recognizing lack of support for privacy interest).

259. *Id.* (Kennedy, J., dissenting).

260. *Id.* at 2374. The Bar originally sought to justify the ban as a reasonable time, place and manner restriction. *McHenry*, 21 F.3d 1038, 1044-45 (11th Cir. 1994), *rev’d on other grounds*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995). The Supreme Court, however, did not address this argument.

When a particular type of speech is given First Amendment protection, the Court has recognized that the state may still place reasonable time, place and manner limits on the speech. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *In re Primus*, 436 U.S. 412, 438 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). In *Clark*, the Court listed the requirements for these limitations. *Clark*, 468 U.S. at 293. First, the limitation must be content neutral. *Id.* Second, the limitation must be “narrowly tailored to serve a significant government[al] interest.” *Id.* Third, the limitation must leave open “alternative channels for communication.” *Id.*

The *McHenry* court stated that the ban’s language was obviously limited to personal injury and wrongful death solicitation, and was therefore, not content neutral. *McHenry*, 21 F.3d at 1040 (recognizing that rule refers to potential personal injury and wrongful death clients); *see Florida Bar: Petition to Amend the Rules*

the home through multiple unrestricted channels, privacy is minimally protected.²⁶¹ The same can be said with regard to intrusiveness. It is unlikely that a victim will feel less violated and angry by a general mailing received two days after an accident than a targeted mailing received in thirty-one days. Moreover, given the ban's short duration, it is doubtful that any feelings of intrusion will be alleviated.

Additionally, the ban is unlikely to maintain professionalism because only one channel of communication is restricted and numerous methods of communicating with the same people remain open.²⁶² Furthermore, because the ban only regulates the behavior of plaintiff attorneys, unrepresented victims may find themselves at the mercy of defense attorneys and insurance adjusters.²⁶³ Indeed, because the ban is so brief, it is improbable that the Bar's reputation will incur any benefit. Moreover, the Bar's restriction places a premium on the protection and privacy of personal injury and wrongful death victims, but it offers no protection to those consumers subject to solicitation in closely related areas of law, such as probate, when they may in fact be the same people.²⁶⁴ If the Bar wishes to maintain dignity throughout the legal profession, then the ban should apply to every area of the law without discretion. Thus, the restriction also

Regulating the Fla. Bar - - Advertising Issues, 571 So. 2d 451, 466 (Fla. 1990) (stating lawyers are prohibited from soliciting potential personal injury and wrongful death clients for legal employment) (quoting RULES REGULATING THE FLORIDA BAR Rule 4-7.4 (1994)). A probate attorney may send a letter to the same people involved in the same situation without being subject to the ban. *McHenry*, 21 F.3d at 1045. Therefore, the Bar would need to examine the letters' content in order to determine whether they would be subject to the ban. Because of the ban's discriminatory nature, it is not content neutral and therefore fails the first requirement of the *Clark* test. *Id.* Furthermore, because the *McHenry* court denied the validity of the time, place and manner restriction based upon the content neutral requirement, the court never reached the other portions of the test. *Id.*

261. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) (noting that general mailings involve the same type of invasion of privacy as targeted, direct-mail solicitation); *McHenry*, 21 F.3d at 1044 (noting that First Amendment protects most advertising that enters the home). The Supreme Court in *Shapero* and Eleventh Circuit Court in *McHenry* proposed that invasion of privacy occurs when the attorney learns of the situation, not when he or she confronts the potential client with the information. *Shapero*, 486 U.S. at 476; *McHenry*, 21 F.3d at 1044. Thus, it is implied that mail solicitation, after the fact, involves no invasion of privacy.

262. Cf. *McHenry*, 21 F.3d at 1044 (stating that if only one channel of communication is restricted to protect privacy, protection would be ineffective).

263. Brief for Respondents at 15, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (No. 94-226); see Marcia Coyle, *Ad Decision Could Spur a Rollback*, NAT'L L.J., July 3, 1995, at A1 (interviewing lawyer recognizing that ban gives insurance and corporate defense attorneys advantage); Trevor Jensen & Mike Folks, *Attorneys Must Wait to Pitch Services; Accident Victims Get Solicitation Reprieve*, SUN-SENTINEL, June 22, 1995, at 1A (stating that defendants get "leg up" on case preparation); Frank J. Murray, *Court Allows Curbs on Lawyers; Profession's Image Cited in Decision*, WASH. TIMES, June 22, 1995, at A4 (recognizing that vulnerable victims are still exposed to defense attorneys shortly after the accident).

264. *McHenry*, 21 F.3d at 1045 (noting solicitation of same potential personal injury or wrongful death client is allowed for probate representation).

fails the third prong of the *Central Hudson* test because it does not adequately advance the Bar's interests.

As modified by *Fox*, the fourth part of the *Central Hudson* test involves a determination of whether there is a "fit" between the proposed governmental interest and the restriction "narrowly tailored" to meet the objective.²⁶⁵ The ban in *Went For It* imposed a substantial burden on the free flow of information and suppressed too much speech in the name of its stated objectives.²⁶⁶ The court must contemplate whether there is a considerable discrepancy between the purported harms and the burden on speech when it evaluates a speech regulation.²⁶⁷ In *Went For It*, the "fit" between the thirty-day ban and the Bar's justifications was not reasonable and the ban was not narrowly tailored to meet the stated objectives.²⁶⁸

The predominant problem with the thirty-day ban is that it applies to *all* accident victims and their families.²⁶⁹ The majority attempted to justify this overbroad categorization because of the difficulty of line drawing.²⁷⁰ Justice Kennedy recognized that criminal law distinguishes between degrees of harm, demonstrating the ability to distinguish between serious and less serious injuries for the purposes of free speech.²⁷¹ Physical injuries aside, the law is replete with mental and emotional matters that are routinely considered in the courtroom without incident.²⁷² Therefore, the blanket ban is clearly excessive.

Furthermore, the *Went For It* majority was unjustified in its assumption that most targeted, direct-mail solicitation is unwelcomed.²⁷³ Rather,

265. *Board of Trustees v. Fox*, 492 U.S. 469, 477-81 (1989). For a discussion of the least restrictive means test as modified by *Fox*, see *supra* notes 92, 127-31 and accompanying text.

266. See *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2384 (1995) (Kennedy, J., dissenting) ("[T]here is a wild disproportion between the harm supposed and the speech ban enforced.").

267. See *Fox*, 492 U.S. at 480 (stating that scope of regulation should be in proportion to proposed interest); *In re R.M.J.*, 455 U.S. 191, 203 (1982) ("[T]he interference with speech must be in proportion to the interest served."); *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) ("[T]he regulatory technique must be in proportion to . . . [the proposed state] interest.").

268. *Went For It*, 115 S. Ct. at 2384 (Kennedy, J., dissenting).

269. *Id.* (Kennedy, J., dissenting).

270. *Id.* at 2380.

271. *Id.* at 2384-85 (Kennedy, J., dissenting).

272. Criminal law involves consideration of a mental element, i.e., mens rea or intent, in many crimes. For a general discussion of mens rea in criminal law, see SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES - CASES AND MATERIALS* 217-18 (5th ed. 1989). Tort law includes the claim of intentional infliction of emotional distress. For a general discussion of the tort of intentional infliction of emotional distress, see WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS* 50-65 (8th ed. 1988). Therefore, the courts regularly deal with not only varying degrees of physical injury, but also many mental and emotional issues.

273. *Went For It*, 115 S. Ct. at 2385 (Kennedy, J., dissenting).

given the broad categories of personal injury and wrongful death, it is undeniable that mailing recipients are concerned with varying legal situations involving different degrees of sensitivity.²⁷⁴ Early solicitation will not offend victims with less serious injuries, and these victims are apt to benefit from prompt legal representation.²⁷⁵ With regard to all injuries, Justice Kennedy appropriately recognized the majority's self-defeating claim that the availability of other marketing channels for attorney advertising makes early solicitation unnecessary.²⁷⁶ By acknowledging the existence of these alternative means, the majority effectively conceded the need for early representation.²⁷⁷ Moreover, some cases require early representation so that those people with little education, language skills and familiarity with the legal system can be properly informed of their legal rights.²⁷⁸

The existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."²⁷⁹ In *Went For It*, such a restrictive regulation was unnecessary because of the problem's apparent self-policing solution.²⁸⁰ Obviously, people are unlikely to hire attorneys who offend them. If public opinion regarding targeted, direct-mail solicitation is as low as the Bar claims, lawyers will eventually suffer financially through loss of clients and will consequently reform their ways. Requiring targeted, direct-mailings to contain the imprint "Advertising Material" on the envelope would address privacy and reputational concerns.²⁸¹ Privacy is minimally impacted when

274. *McHenry*, 808 F. Supp. 1543, 1548 (M.D. Fla. 1992) (noting "degrees of loss or suffering" involved in personal injury and wrongful death areas of law) (quoting *In re Anis*, 599 A.2d 1265, 1271 (N.J.), *cert. denied*, 504 U.S. 956 (1992)), *aff'd*, 21 F.3d 1038 (11th Cir. 1994), *rev'd on other grounds*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

275. *Went For It*, 115 S. Ct. at 2385 (Kennedy, J., dissenting).

276. *Id.* (Kennedy, J., dissenting).

277. *Id.* (Kennedy, J., dissenting).

278. *Id.* (Kennedy, J., dissenting).

279. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993).

280. *Went For It*, 115 S. Ct. at 2385 (Kennedy, J., dissenting).

281. RULES REGULATING THE FLORIDA BAR Rule 4-7.4(b)(2)(A) (West 1995) (requiring that mail solicitation by Florida attorneys contain inscription "advertisement" in red on face of envelope and every page of letter); *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(c) (1994) (requiring words "Advertising Material" to appear on all written or recorded communications between lawyer and client where client needs legal services and has no familial or prior professional relationship with lawyer); ARK. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(c) (Michie 1995) (requiring words "Advertising Material" to appear on envelope and at beginning and end of written and recorded solicitations); ARIZ. RULES OF PROFESSIONAL CONDUCT Rule ER 7.3(b) (West 1995) (requiring words "ADVERTISING MATERIAL: THIS IS A COMMERCIAL SOLICITATION" to appear on all targeted, direct-mail solicitations to protect public and clearly indicate commercial nature of mailing); CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400, standard 5 (West 1995) (defining violation of rules as failure to include word "Advertisement" on envelope and first page of mail solicitation in twelve point print); DEL. LAWYERS'

a person can observe the letter's nature before the envelope is opened. Further, because the envelope would openly alert the recipient of the letter's nature and content, this could be interpreted as honest and direct behavior. Additionally, the Bar could develop a system where people could register their names if they do not desire to receive any mailings from attorneys. Attorneys who wish to partake of targeted, direct-mail solicitation should pay for the list and refrain from mailing to those people or be subject to discipline.²⁸² A telephone number or address could be made available through community interactions with the Bar and placed in each mailing so that a recipient can register after he or she receives a mailing. Inclusion of the number or address would be no more burdensome than including a disclaimer.²⁸³ Consequently, even if a person re-

RULES OF PROFESSIONAL CONDUCT Rule 7.1(h) (Michie 1994) (requiring "Advertising Material" to appear on envelope and each page of direct mail advertisement); MASS. CANONS OF ETHICS AND DISCIPLINARY RULES DR 2-103(C)(1) (West 1995) (requiring "advertising" to appear on face of solicitation and envelope or container); OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(F)(1)(e) (West 1994) (requiring words "ADVERTISEMENT ONLY" to appear on text and envelope of solicitation in red ink).

282. This suggestion is similar to the suggestions in *Shapero* and *In re R.M.J.*, where the Court stated that attorneys could be required to submit copies of mailings to a state agency or bar association with supplementary information, such as lists of potential clients and sources of information to facilitate regulation and prevent abuses. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476-78 (1988); *In re R.M.J.*, 455 U.S. 191, 206 (1982). Although such requirements could subject the agency or bar to a burdensome task, the *Shapero* Court refused to give weight to this fact. *Shapero*, 486 U.S. at 476-77. Justice Brennan found "no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements." *Id.* at 477. For a discussion of *In re R.M.J.*, see *supra* notes 95-100 and accompanying text.

For a proposed rule regarding written solicitation by attorneys that may pass constitutional muster, see Mauro, *supra* note 38. The rule addresses both general mailings and targeted, direct-mail solicitations. Mauro, *supra* note 38, at 320. The rule requires an attorney to submit to the appropriate agency: (1) a copy of the letter at least 10 days prior to mailing; (2) documents stating how the attorney learned of the situation and how the attorney verified the facts; and (3) a listing of the potential recipients. *Id.* at 320-21. Further, attorneys are required to include specific information in the letter and to retain a copy of the letter for a certain number of years. *Id.* at 321-22. The rule also prohibits attorneys from sending a mailing if they know that the potential client already has an attorney, that the recipient does not want to receive the mailing or if the mailing involves "coercion, duress or harassment." *Id.* at 322. Finally, the rule defines the manner in which contingent fee arrangements may be presented. *Id.* This rule provides protection for the recipients of targeted, direct-mail solicitations while avoiding substantial infringement upon the First Amendment protection for legal advertising. *Id.* at 323.

283. The *Shapero* Court suggested the use of disclaimers in targeted, direct-mailings as a way to avoid confusion among consumers. *Shapero*, 486 U.S. at 477-79; see *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1984) ("[A]dvertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."); *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) (recognizing possible use of disclaimers).

ceived a mailing, he or she would later learn that the Bar was taking steps to avoid further intrusions, if they are in fact unwanted. This procedure would avoid the association of intrusive conduct with the entire Bar. Therefore, because of these alternative methods of regulation, the "fit" between the means and the ends is not reasonable and the means are not sufficiently narrowly tailored to satisfy the fourth prong of the *Central Hudson* test as modified by *Fox*.

It is clear from a careful analysis of Supreme Court precedent that the Court reached an incorrect result in *Went For It*. The Florida Bar's attempt to restrict targeted, direct-mail advertising to potential personal injury and wrongful death clients for thirty days fails to withstand the assault of the First Amendment. Justice Shaw of the Florida Supreme Court stated it best when he considered this case: "In sum, it appears to me that the majority, out of frustration and annoyance, is swatting at a troublesome and persistent Bar fly with a sledgehammer."²⁸⁴

V. CONCLUSION

In *Went For It*, the Supreme Court incorrectly applied its precedent and undermined important First Amendment guarantees. In this case, Justice O'Connor took the first step in her crusade to overturn *Bates*.²⁸⁵ It is a miscarriage of justice for the Court to superficially protect the reputation of the Bar at the expense of those who need the most protection.²⁸⁶ Justice O'Connor recognized that the Bar sought to prohibit activities having a negative impact upon the administration of justice.²⁸⁷ The real negative impact, however, is upon those naive potential clients whose access to the courts will be hampered because they are not directly exposed to information regarding their legal rights. The Court in *Went For It* reverted to

284. Florida Bar: Petition to Amend the Rules Regulating the Fla. Bar — Advertising Issues, 571 So. 2d 451, 475 (1990) (Shaw, J., concurring in part and dissenting in part).

285. *Edenfield v. Fane*, 113 S. Ct. 1792, 1804 (1993) (O'Connor, J., dissenting). In *Edenfield*, Justice O'Connor stated, "I continue to believe that this Court took a wrong turn with *Bates v. State Bar of Arizona* . . . , and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech." *Id.* (O'Connor, J., dissenting). See also *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 119 (1990) (O'Connor, J., dissenting) (noting existence of difficulties when commercial speech doctrine is applied to professional standards of conduct); *Shapiro*, 486 U.S. at 480 (O'Connor, J., dissenting) (asserting that cases supporting First Amendment protection of legal advertising are "built on defective premises and flawed reasoning"); *Zauderer*, 471 U.S. at 676 (O'Connor, J., dissenting) (stating that state regulation of professionals should receive more deference than regulation of claims regarding commercial goods and merchandise).

286. See *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2385 (1995) (Kennedy, J., dissenting) (stating that uneducated, illiterate and those people lacking familiarity with legal system will be most harmed by ban).

287. See *id.* at 2376 (stating that Bar sought to prohibit activities reflecting badly upon its image).

nothing more than censorship for its own sake.²⁸⁸ As stated by Justice Kennedy, "the image of the profession cannot be enhanced without improving the substance of its practice."²⁸⁹ "The guiding principle . . . is that full and rational discussion furthers sound regulation and necessary reform."²⁹⁰

It is a travesty that the impact of *Went For It* will be far-reaching and long-term. Justice O'Connor has plainly stated her desire to prohibit legal advertising. With four other Justices on her side, she may accomplish that goal. In the near future, attorneys can expect stricter regulation on advertising and their First Amendment rights relating to commercial speech.²⁹¹ It is impossible to predict what the far future holds, but with Justice O'Connor seated on the Court, the future of *Bates*, legal advertising and solicitation looks bleak.

Privacy and professionalism are important interests warranting extremely careful discussion. However, a faithful application of Supreme Court precedent leads one to conclude that these interests fail to support the *Went For It* ban when placed under First Amendment scrutiny. The ban at issue in *Went For It* restricts too much speech at too great a cost. Care should be taken to address unpopular practices of the legal profession in a direct and open manner. Attempts to conceal controversial procedures in the name of the Constitution results in injustice. Meanwhile, attorneys should be mindful of their profession's status in society. As Judge Black, writing for the Eleventh Circuit, stated regarding the ban: "Although the Bar may not formally restrict such behavior, an attorney's conscience, self-respect, and respect for the profession should dictate self-

288. See *id.* at 2386 (Kennedy, J., dissenting) (stating that majority assumed role of censor to protect reputation of their profession); see also Stephen Chapman, *When Public Ignorance is Good for Lawyers*, CHI. TRIB., June 25, 1995, at C3 ("[T]he government may suppress truthful, nondeceptive communications on important matters simply to protect lawyers from public disdain."); Coyle, *supra* note 263, at A1 (interviewing lawyer claiming that case is example of "lawyers trying to protect lawyers"); Jensen & Folks, *supra* note 263, at 1A (interviewing lawyer stating that lawyers' views of legal advertising are clouded with concerns with image); Murray, *supra* note 263, A4 (interviewing attorneys claiming that emotion and elitism influenced case); Lara Wozniak, *Ruling on Solicitations by Lawyers Brings Debate*, ST. PETERSBURG TIMES, June 26, 1995, at 12 (interviewing lawyer stating that judges are more sensitive towards legal advertising).

289. *Went For It*, 115 S. Ct. at 2386.

290. *Id.*

291. See *Lawyer's Client Solicitations Curbed*, FACTS ON FILE WORLD NEWS DIG., June 29, 1995, at A1 (noting majority's departure from Supreme Court precedent); Linda Greenhouse, *High Court Backs Florida Restriction on Solicitation of Accident Victims by Lawyers*, N.Y. TIMES, June 22, 1995, at A1 (recognizing majority's split with former decisions and doubt cast on subsequent rulings).

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restraint in this area. To preserve the law as a learned profession demands as much."²⁹²

Tara L. Lattomus

292. *McHenry*, 21 F.3d 1038, 1045 (11th Cir. 1994), *rev'd*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).